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# Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias

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# Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias

Sharon E. Rush\*

## ABSTRACT

Each individual has a background, and that background shapes the individual's views about life, creating an inevitable form of bias referred to as "experiential bias." Experiential bias is shaped by many identity traits, including, among others, race, sex, sexual orientation, religion and even geography. The geographic identity of state judges and their potential unfair experiential bias is the common justification for federal court diversity jurisdiction. But experiential bias is inescapable, affecting everyone who's ever had an experience, and is generally not unfair, as demonstrated by most studies regarding the "fairness" justification for diversity jurisdiction. More recently, Justice O'Connor connected racial and geographic identity in her *Grutter* opinion, specifically acknowledging that the experiences associated with race and with growing up in a particular region shape a person's views. This article explores how geographic identity and other identity traits are important to both federalism and equality principles because state identity is at the heart of federalism and individual identity is at the heart of equality. Both states and individuals, with the associated experiential biases stemming from geography and other identity traits, have interests in being represented in a democracy that values federalism and equality.

In recent years, the geographic background of the United States Supreme Court, for instance, has shifted from one which is representative of the nation, to one dominated by appellate judges from the northeast. The importance of this shift cannot be overstated, as studies have shown that judges are as much as twice as likely to affirm opinions from their geographic "home" courts as those from any other. Also, as discussed following Justice Sotomayor's "wise Latina woman" comment, the Court lacks diversity in ways that implicate equality principles as well. This article concludes that for purposes of federalism, diversity, and equality, the selection pool for Article III judges must be broadened in terms of both geography and experience.

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“The life of the law has not been logic; it has been experience.”  
– Justice Oliver Wendell Holmes, Jr.

## I. INTRODUCTION

What does a state’s interest in federalism have in common with an individual’s interest in equality? This Article offers an answer to this question by exploring the rich and complicated relationship among federalism, diversity, equality, and the Article III judiciary. This relationship takes center stage in a number of cases decided by the Rehnquist and Roberts Courts. For example, in the 2013 term alone the Court decided cases involving the balance between federalism and equality in the areas of voting rights,<sup>1</sup> gay rights,<sup>2</sup> and affirmative action.<sup>3</sup> For the past several decades, the Court has been increasingly interested in deciding cases in which federalism and equality are pitted against each other. This Article suggests that remarkable similarities exist between a state’s interest in federalism and an individual’s interest in equality. An exploration of geography, identity, and bias in the context of the Article III judiciary highlights those similarities.

The idea for this exploration springs from the Supreme Court’s opinion in *Grutter v. Bollinger*, in which the Court held that a state has a compelling interest in admitting a diverse class of students to its public universities, and can therefore use race as a factor in making admissions decisions.<sup>4</sup> Writing for the majority, Justice O’Connor opined: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of

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1. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013) (holding that federal law preempts Arizona’s proof of citizenship requirement for voting in federal elections); *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding section 4 of the Voting Rights Act of 1965 unconstitutional because the formula used for evaluating whether a state needs preclearance is not up-to-date).

2. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that section 2 of the Defense of Marriage Act, which defines marriage as between a man and a woman, is unconstitutional); *Perry v. Hollingsworth*, 133 S. Ct. 2652, 2668 (2013) (holding that private party plaintiffs lacked standing to defend a state statute by challenging the lower courts’ rulings that California’s ban on same-sex marriage is unconstitutional). The *Windsor* decision further acknowledged that states have the authority to decide whether or not to allow same-sex marriage, but the federal government cannot deny the equal protection of same sex couples who are validly married by their state. 133 S. Ct. at 2691.

3. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (stating that “[s]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”).

4. 539 U.S. 306, 343 (2003).

being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>5</sup>

No one is surprised that racial identity helps shape a person’s views or that valuing diverse viewpoints supports racial equality. Justice O’Connor’s opinion, however, highlights that geographic identity also influences an individual’s views. And, of course, federalism and geography are inextricably intertwined.

Justice O’Connor’s observation, that both geographic and racial identity help shape an individual’s views, invites an exploration into the similarities between the two and how they relate to federalism and equality. Understanding this relationship is critically important, especially given the country’s history. Significantly, geography and race shaped the states’ earliest identities, particularly in the ways that the country respected a state’s identity and sovereignty at the expense of slaves and their individual racial identities.<sup>6</sup> The desire of some states to expand slavery into the new Western territories created a major rift between states that began to identify as either “slave” or “free” states.<sup>7</sup> These differences ultimately caused the Civil War.

The Thirteenth Amendment abolished slavery, but the historical slavery divide that separated the North from the South had a lasting impact on the identities of those regions and the states and individuals within those regions. For example, the issue in the recent Supreme Court case *Shelby County, Alabama v. Holder* was whether Shelby County, Alabama, and other counties and states more generally, no longer discriminated on the basis of race in its voting practices, thus freeing the county from having to seek preclearance from the federal government before implementing any changes to its voting laws.<sup>8</sup> Chief Justice Roberts asked during oral arguments if it was the government’s position that “the citizens in the South are more racist than citizens in the North[.]”<sup>9</sup> At a press conference following the hearing, Shelby County Attorney Frank Ellis said, “We are a different and better nation today so it is only right that our federal laws should treat each of the 50 states equally.”<sup>10</sup>

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5. *Id.* at 333.

6. See generally Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2013) (suggesting that constitutional doctrine should consider the way people inside a geographic space are treated to determine if discrimination exists).

7. *Id.* at 426.

8. 133 S. Ct. 2612, 2627-28 (2013).

9. Transcript of Oral Argument at 41-42, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-96.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf); Adam Liptak, *Voting Rights Law Draws Skepticism from Justices*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/us/politics/conservative-justices-voice-skepticism-on-voting-law.html> (internal quotation marks omitted).

10. *Supreme Court Arguments Concluded in Shelby Co. Ala v. Holder*, N.J. NEWS (Feb. 27, 2013), <http://www.nj.com/business/prnewswire/index.ssf?/>

*Shelby County* and Chief Justice Roberts' question, along with the responses it generated, could not be more poignantly illustrative of the lingering effects slavery has had on the identity of both southern and northern states, as well as the individuals living in those states.

Today, the tension between states' interest in federalism, individuals' interest in equality, and their shared interest in protecting their identities as full participants in our democracy is evident in myriad contexts.<sup>11</sup> Picture the images of people suffering in Louisiana in the aftermath of Hurricane Katrina, or think of the executives sitting around a large walnut conference table at a corporate board meeting on Wall Street.<sup>12</sup> Consider the importance of race and federalism in the contexts of gerrymandering,<sup>13</sup> public education,<sup>14</sup> health care,<sup>15</sup> juvenile justice,<sup>16</sup> and prison incarceration.<sup>17</sup> As these examples illustrate, the mental picture of who inhabits what space is historically and currently racial.

Part I of this Article highlights how state identity is central to Article III because, in our democracy and consistent with the Tenth Amendment, the state is the primary unit from which federalism is measured.<sup>18</sup> States are

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[nj/story/?catSetID=7012&catID=819202&nrid=193582041&page=37](#) (internal quotation marks omitted).

11. See generally Boddie, *supra* note 6 (exploring how race defines many spaces, to the exclusion of people of color, often resulting in forms of discrimination that the law overlooks).

12. Of the Fortune 500 CEOs, only 4.2% are racial minorities (blacks are 0.8%, Asians are 1.8%, Latinos are 1.2%). See Crosby Burns, Kimberly Barton & Sophia Kerby, *The State of Diversity in Today's Workforce: As Our Nation Becomes More Diverse so Too Does Our Workforce*, CTR. FOR AM. PROGRESS (July 12, 2012), <http://www.americanprogress.org/issues/labor/report/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/>.

13. See generally Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903 (2012) [hereinafter Stephanopoulos, *Spatial Diversity*].

14. See, e.g., Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013); Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367 (2013).

15. See generally U.S. Dep't of Health & Human Servs., *National Healthcare Disparities Report 2013*, AGENCY FOR HEALTHCARE RES. & QUALITY (2013), <http://www.ahrq.gov/research/findings/nhqrdr/nhdr13/2013nhdr.pdf>.

16. See, e.g., Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/thetop=10-most-star> (70% of students referred for discipline were black or Hispanic).

17. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* (NYU Press 2d ed. 2009).

18. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010), for an interesting analysis of the role institutions other than states (and cities) play in "Our Federalism."

identified by their geographic boundaries, the electoral college gives each state a voice in the election of the President,<sup>19</sup> and each state is represented in Congress by two senators<sup>20</sup> and a pro rata share of representatives in the House.<sup>21</sup> Each state also has its share of Article III judges,<sup>22</sup> making these judges essentially representatives of the states. Admittedly, the judges' Article III life tenure and salary protection<sup>23</sup> tend to camouflage the representational connection they have with the states and the people. Those protections create an impression that the judges must be sealed off from the people precisely so the people cannot unduly influence the judges, who must be independent and impartial. In reality, the idea that Article III judges are representatives of the states and the people is found in the constitutional provisions that empower the President to nominate judges to the Article III bench, provide for Senate confirmation of the judges,<sup>24</sup> and even in those provisions that provide for impeachment.<sup>25</sup> The representational connections function to preserve important constitutional values: separation of powers, federalism, and individual liberties, including equal protection. This Article focuses on the relationship among federalism, equality, diversity, and Article III.

As important as it is to have each state represented in the Article III judiciary, the Framers' concern about states being biased in favor of their own citizens in state court provided the rationale for Article III's diversity jurisdiction.<sup>26</sup> "Bias" in this context, of course, can only mean a shared "ideology" based on a shared geography between a litigant and his or her home state judge.<sup>27</sup> Diversity jurisdiction allows a litigant to escape the potential unfair bias in state court by bringing his or her claim in federal court.<sup>28</sup>

This Article explores this deep irony: states have a representational right, consistent with federalism, to participate in the Article III judiciary even as Article III provides individuals with a forum to escape state bias, consistent with equality. The Framers acknowledged, and Congress goes to great lengths to preserve, the principle that a state's representation *as a state* in the Article III judiciary is an important part of federalism. For example, a state's identity as a *unified sovereign* is a core aspect of federalism. With one exception, no state in history has ever been required to disaggregate itself and violate its unified sovereignty by being geographically divided across circuit

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19. U.S. CONST. art. II, § 1, cl. 2-3; U.S. CONST. amend. XII.

20. U.S. CONST. art. I, § 3, cl. 1.

21. U.S. CONST. art. I, § 2, cl. 3.

22. 28 U.S.C. §§ 81-144 (2012).

23. U.S. CONST. art. III, § 1.

24. U.S. CONST. art. II, § 2, cl. 2.

25. U.S. CONST. art. I, § 3, cl. 6.

26. *See infra* Part V.A.

27. *See infra* Part V.A.

28. *See infra* Part V.A.

court jurisdictions.<sup>29</sup> Simultaneously, notwithstanding repeated proposals over the years, Congress has declined to pass legislation that would eliminate diversity jurisdiction.<sup>30</sup> Thus, the irony persists.

In a different but similar vein, sometimes judges with certain identity traits are accused of being unfairly biased against litigants who have different identity traits. This is explored more fully in Part V, but a brief example is a female judge who presides over a sexual harassment suit brought by a woman against a man. Notwithstanding accusations of unfair bias against the judge who is presumed to identify with the other woman, she has a right, consistent with equality principles, to be a judge.

One way to begin to appreciate this irony is to gain a fuller understanding of identity and bias. Accordingly, in Part II, I focus on the concept of “experiential bias” to distinguish it from the bias associated with diversity jurisdiction or the bias leveled at the female judge in the sexual harassment case. The meaning of “experiential bias” is largely self-evident; people make decisions based on what they have learned from their experiences. This type of bias is enjoyed by every human being, and is presumed to be exercised by judges in a sound, reasonable, and fair manner. Myriad individual identity traits inform a person’s experiential biases. Race is one of the most obvious and is at the center of several recent cases, including *Grutter*<sup>31</sup> and *Shelby County*.<sup>32</sup> But, as the *Grutter* Court acknowledged, an individual’s experiential bias is also informed by their geographic identity.<sup>33</sup> In Part III, I explore seven valuable lessons we can learn from *Grutter* about the relationship among federalism, diversity, and equality. Just as the Article III judiciary should be racially diverse as a matter of equality, so too must it be geographically diverse as a matter of federalism.

Distinguishing between the unfair bias associated with diversity jurisdiction and the experiential bias that is part of being human, and understanding how they interact, is necessary to protecting both federalism and equality. This is the main focus of Part IV of this Article. A growing body of identity

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29. Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROC. 201, 244 (2011) (footnote omitted) (“[D]istrict boundaries have never crossed state lines.”). The one exception is Wyoming, which was split because of the special geography of Yellowstone National Park. See generally Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675 (2005) (discussing the unique structure of the jurisdiction of the United States District Court for the District of Wyoming).

30. See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1829 (2008) [hereinafter Purcell, *Class Action*].

31. 539 U.S. 306 (2003).

32. 133 S. Ct. 2612 (2013).

33. *Grutter*, 539 U.S. at 333.



scholarship offers valuable insights about judicial bias.<sup>34</sup> Identity scholarship sprouted from the need to address structural obstacles within our legal system that impede the attainment of equality by diverse groups.<sup>35</sup> These groups were historically unrepresented in the government because of their identities and continue to fight for equality. This struggle is multi-faceted, but two aspects are relevant to this Article. First, the struggle has shown that all public spaces, including seats on the judiciary, must be open to all citizens consistent with equal protection. Simply being included in the right to share public spaces, including the judiciary, is a matter of individual equality. I refer to this as the “Individual Equality Principle.”

Second, identity scholarship exposes hidden biases in judicial decisions that are presented as “neutral” but which favor historically privileged groups and, concomitantly, maintain the inequality of historically subordinated groups.<sup>36</sup> For example, it is now well-recognized that people can unfairly judge other people based on the phenomenon of “unconscious racism.”<sup>37</sup> When a judge renders a decision that is rooted in unconscious racism, the effect is harmful to all racial minority groups and to the entire justice system. I refer to this as the “Group Equality Principle.”

More and more, the Equality Principles are expressed as a need to have a *diverse* judiciary; however, it is important to emphasize that a desire to have a diverse judiciary – like a diverse classroom – is rooted in basic equality and representation principles. Insights gained from identity scholarship are helpful in understanding how *geographic* diversity on the Article III judiciary is also supported by federalism. Part V of this Article analyzes experiential bias in the context of federal jurisdiction (diversity and federal question) to demonstrate the relationship between the Individual Equality and the Group Equality Principles in the context of states’ rights to participate in Article III judicial decision making. A diverse judiciary, including a geographically diverse judiciary, is the key to avoiding unfair bias or, more realistically, the key to ensuring that any unfair bias is shared relatively evenly among groups or states. Critically important, a geographically diverse judiciary promotes federalism and is consistent with the Equality Principles because experiential bias that comes from being a citizen of a state adds a representational dimension to Article III judging.

Although this Article draws on identity scholarship to support the argument that the Article III judiciary must be geographically diverse consistent with federalism and the Equality Principles, two important points need to be made. This Article is not suggesting that geographic identity is more important than or even as important as racial identity (or identity based on

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34. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987).

35. See *id.* at 326.

36. See Lawrence III, *supra* note 34.

37. *Id.*

other traits). Rather, it is suggesting that there are remarkable similarities between states and their claims of sovereignty, and individuals and their claims of equality. Race is not the only identity trait to bridge these two areas, but it is the primary one. One only has to think of Jim Crow laws and the lingering effects of racial segregation to imagine how the experiences of people on both sides of the color line shaped their identities. Today, the greatest percentage of African Americans in the United States is in southern states, yet Alabama did not have its first African-American Article III judge until 1980.<sup>38</sup> These observations exemplify the important relationship among geography, federalism, equality, and Article III. A major accomplishment of this Article is that it uniquely brings together these ostensibly unrelated concepts and bodies of scholarship.

Finally, Part VI of this Article focuses on diversity, particularly geographic diversity, and the Supreme Court. In fact, a primary impetus for researching and writing this Article was to explore how, over time, geography plays less and less of a role in the nomination process. There are still nineteen states that have never been represented on the Court.<sup>39</sup> Current members of the Court Chief Justice Roberts and Justices Scalia, Ginsburg, and Thomas served on the United States Court of Appeals for the District of Columbia Circuit prior to their appointments to the Supreme Court.<sup>40</sup> Empirical studies show that the Justices, in a statistically significant way, vote to affirm decisions coming from their home circuits.<sup>41</sup> This suggests an unfair, albeit probably unconscious, bias at work. This example barely touches the ways in which the Court has become less diverse, including geographically, a trend that started in the 1970s.<sup>42</sup> This is cause for concern because the lack of geographic diversity at the highest level of judicial review results in an overrepresentation of certain voices with similar experiential biases to the exclusion of others.<sup>43</sup> The concerns that the Court is not racially, religiously, and

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38. Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 *LAW & SOC. INQUIRY* 679, 733 (1999).

39. See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 *FLA. L. REV.* 1137, 1163, 1163 n.82 (2012); see also *infra* Part VII.A.2.

40. One could say this makes them less biased because D.C. is not a state. But see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1578 (2010) (suggesting that Justices who are newcomers to the D.C. area are more influenced by the city's "liberal bent" than are Justices who already reside in D.C. when they are appointed).

41. See generally Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 *U. PA. L. REV.* 833, 834 (2009).

42. See Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 *DRAKE L. REV.* 609, 615 (2008); see also Barton, *supra* note 39, at 1172-73.

43. See *infra* Part VII.

gender diverse as a matter of equality have been at the forefront of discussions about bias. This Article adds to that concern by showing how federalism and diversity are related to equality and representation principles.

Putting geographic diversity into the discussion about federalism, Article III, and the Equality Principles is important in itself. This Article offers a timely opportunity to learn about this relationship because it is at the center of several recent Supreme Court cases. For example, in the 2012 case *Arizona v. United States* the Court decided that Arizona's power as a sovereign is limited with respect to its authority to regulate illegal immigration.<sup>44</sup> This term, in addition to *Shelby County*, the Court decided *Fisher v. University of Texas at Austin*<sup>45</sup> – a case which bears on *Grutter* and the continuing need for affirmative action. Although the *Fisher* Court did not overrule *Grutter*, it might one day. But even if *Grutter* were overruled it would not affect the rich and complicated relationship among equality, diversity, federalism, and Article III. Rather, a deeper understanding of geography, identity, and bias would continue to tie them all together.

## II. FEDERALISM AND GEOGRAPHY

### A. *The Importance of States*

“Federalism” means different things to different people.<sup>46</sup> Beginning in the 1970s,<sup>47</sup> the term “federalism” has often been equated with “states’

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44. 132 S. Ct. 2492, 2510 (2012).

45. 133 S. Ct. 2411 (2013).

46. To the original Federalists, including the authors of the Federalist Papers, Alexander Hamilton, John Jay, and John Adams, it meant the United States should have a strong, centralized government. See Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 448 (1996). Republicans, also known as Anti-Federalists, including Thomas Jefferson, Patrick Henry, and George Mason, feared that too strong a national government would undermine the independence of the states. See, e.g., *United States v. Emerson*, 270 F.3d 203, 236 (5th Cir. 2001) (discussing the anti-federalists in a historical context). The ebb and flow of this debate is a central part of United States’ history, often played out in questions about Congress’ power to regulate commerce. See generally *United States v. Lopez*, 514 U.S. 549 (1995). Over the course of the ensuing 200 years, the Court has both broadened and narrowed the definition of commerce, always with a corresponding residual waxing and waning effect on state power. Gregory W. Watts, *Gonzales v. Raich: How to Fix a Mess of “Economic” Proportions*, 40 AKRON L. REV. 545, 571 (2007). The struggle over slavery, of course, was an instrumental aspect of this debate. See generally Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015 (1997). Today, the debate continues, not only in the area of commerce but also with respect to individual rights and Congress’ enforcement power under the Fourteenth and Fifteenth Amend-

rights,” ironically an understanding that more closely resembles what the Anti-Federalists believed.<sup>48</sup> Professor Heather Gerken aptly described federalism when she said “[it] has always been understood to be a multiple-headed beast, with courts and scholars routinely deploying multiple and conflicting accounts of what states do.”<sup>49</sup> The tension that characterizes the different understandings of federalism and the allocation of power between the national government and the states is seen even today, for example, in the debates over gay marriage and abortion.

Regardless of how one defines federalism, the Framers clearly intended for it to reflect the United States’ democratic commitment to maintaining a constitutional boundary between the states and the federal government. While the federal and state governments struggled, and continue to struggle, with who is supposed to do what under the Constitution, the Framers insured that the states would have their voices heard and be represented in the federal government. Not only is no state excluded from electing its federal representatives, but the Constitution further ensures that each state’s voice is equally represented.<sup>50</sup> The Supreme Court acknowledged over 100 years ago and reaffirmed in *Shelby County* that “[t]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.”<sup>51</sup> The Constitution has no favorite state; the concept of a “United States” is, by design, the coming together of a diverse group of sovereign states to form a “more perfect Union.”<sup>52</sup>

Equally important to the Framers, federalism acknowledged and valued the constitutional boundaries between states because each state is sovereign in its own right. For example, the Constitution protects the sanctity of a state by prohibiting another state from being established within an existing state’s jurisdiction, and by prohibiting states or parts of states from joining together to establish a new state without the consent of the states and Congress.<sup>53</sup> Chief Justice John Marshall opined in *McCulloch v. Maryland* that “[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one

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ments, as *Shelby County* illustrates. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2621 (2013).

47. See Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1193-94 (1977).

48. See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (providing a detailed analysis of the post-Reconstruction view of a “Federalist” versus “Nationalist” model of the relationship between state and federal courts, or what the author calls “judicial federalism”).

49. Gerken, *supra* note 18, at 10.

50. U.S. CONST. art. 1, § 2, cl. 1.

51. *Shelby Cnty.*, 133 S. Ct. at 2623 (citing *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (federal government lacks power to locate state’s seat of government)).

52. U.S. CONST. pmb.

53. U.S. CONST. art. IV, § 3, cl. 1.

common mass.”<sup>54</sup> Significantly, this opinion is embedded in the very case in which he upheld Congress’ Commerce Clause power to establish a national bank.<sup>55</sup> From Chief Justice Marshall’s view, Congress’ Commerce Clause power, particularly when combined with the Necessary and Proper Clause, was virtually limitless, leaving little room for states to participate in the regulation of commerce.<sup>56</sup> Given his broad reading of the Commerce Clause, Chief Justice Marshall’s comment on the importance of each state is even more remarkable.

The Framers solidified this important relationship between the Article III judiciary and the states by providing in the Constitution that the Senate must approve the President’s judicial nominees.<sup>57</sup> The Framers had many reasons for involving the Senate in the appointments process, including their commitment to having each state’s voice heard on an equal basis.<sup>58</sup> How to protect smaller states from the larger states, of course, was a major focal point of the Constitutional Convention.<sup>59</sup> Senators, a geographically diverse group by definition, could offer suggestions for candidates that otherwise might not come to the President’s attention because of his somewhat geographic isolation at the seat of the government.<sup>60</sup> Involving the Senate also ensured that the larger states would not be able to “outshout” the smaller states and diminish their standing as equal participants in the nomination process.

Today, the selection of nominees to fill vacancies in the lower federal courts is largely managed by the Senate through the use of judicial selection committees situated in a senator’s home state.<sup>61</sup> The President is not bound to accept a nominee through this process, but the process does promote federalism.<sup>62</sup> And, of course, great deference is given to the President’s constitutional authority to nominate justices for the Supreme Court, but again the Framers ensured that states must approve the President’s choices.<sup>63</sup>

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54. 17 U.S. 316, 403 (1819).

55. *Id.* at 424.

56. Chief Justice Marshall opined, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 421. Congress could not regulate commerce under a pretext, according to Justice Marshall, but it otherwise could regulate even intrastate activity that affected interstate commerce. *See id.* at 423.

57. U.S. CONST. art. II, § 2, cl. 2.

58. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 464 (2011).

59. *Id.* at 464-65.

60. *Id.* at 465-66.

61. *Id.* at 467.

62. *See id.*

63. U.S. CONST. art. II, § 2, cl. 2.

Moreover, the importance of *each* state to the Article III judiciary is readily apparent by studying the way in which Congress, using its Article III power, initially structured the federal judiciary – a structure that continues to be respected.<sup>64</sup> If each federal court were pinpointed on a map of the United States, one would see that each state has district courts<sup>65</sup> and that geographically contiguous states<sup>66</sup> are divided into geographic regions, each representing a circuit.<sup>67</sup> The geographic organization of the Article III judiciary is partly due to efficiency concerns, but is also a result of federalism and state participation in protecting individual liberties. It would be unthinkable for a state to have *no* federal district court judges. The Constitution and its Article III judicial structure reflect a commitment to federalism's principle that each state has an important relationship not just with its federally elected representatives, but also with its non-elected federal judges who, in turn, protect individual liberties.

But having an Article III judge presiding in its jurisdiction is only part of the story. It would be unimaginable to have a Kansas resident sitting as a federal judge in Nebraska even if the Kansas resident lived closer to the courthouse than the Nebraska resident. With few exceptions, federal law requires that district and appellate court judges reside in their districts.<sup>68</sup> Residency requirements imposed by Congress on Article III judges acknowledge the importance of the geographic connection those judges have with the citizens in their own states and circuits. As important as the territorial boundaries are that distinguish one state from another, the Framers under-

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64. U.S. CONST. art. III, § 1.

65. See 28 U.S.C. §§ 81-144 (2006).

66. Puerto Rico is part of the First Circuit. 28 U.S.C. § 41 (2006). The Virgin Islands are part of the Third Circuit. *Id.* The District of Canal Zone is part of the Fifth Circuit. *Id.* Guam is part of the Ninth Circuit. *Id.*

67. *Id.* There are thirteen Courts of Appeals: First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico), Second Circuit (Connecticut, New York, Vermont), Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands), Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia), Fifth Circuit (District of Canal Zone, Louisiana, Mississippi, Texas), Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee), Seventh Circuit (Illinois, Indiana, Wisconsin), Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam), Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming), Eleventh Circuit (Alabama, Florida, Georgia), the D.C. Circuit and the Federal Circuit. *Id.* The Federal Circuit has national appellate jurisdiction over particular kinds of cases based on subject matter, for example, patents. U.S. CONST. art. II, § 2, cl. 1.

68. For district court judges, see 28 U.S.C. § 134 (the exceptions for district court judges are the D.C. Circuit, the Southern and Eastern Districts of New York; in the New York districts, however, the judges must reside within twenty miles of their district). For court of appeals judges, see 28 U.S.C. § 44 (the exception is the D.C. Circuit).

stood, as do we today, that a state is more than just a convenient way of marking political boundaries. In other words, states are not just land masses; they are political power bases. A state and its citizens are a community with a shared identity, developed through the course of history as the citizens live out their traditions and customs. Florida and New York share a common national identity as sovereign states within the United States, but Florida's identity is separate and different from that of New York. Ask any Floridian or New Yorker – even if they do not identify “ideologically” with their state – and they will agree: it is one thing to be a Floridian and another to be a New Yorker. The concept of geographic diversity reflects the reality that the United States is a union of fifty unique and sovereign states. As sovereigns, each state is a “territorial community”<sup>69</sup> that “arise[s] from the unique combinations of geography, interests, and identity that characterize particular places.”<sup>70</sup> The Supreme Court recognizes the individuality of states, for example, by calling them “labs of experimentation.”<sup>71</sup>

As sovereign communities, states adopt flags, mottos, birds, flowers, and other symbols to distinguish themselves from each other and to establish their unique identities. A significant part of a state's identity is reflected in its laws,<sup>72</sup> which, to a large extent, establish or reflect a state's norms.<sup>73</sup> A state's ability as a sovereign to establish who is or is not a citizen or a resident, conferring on those persons the various rights and privileges that attach to state membership, is one of the most important aspects of a state's sovereignty.<sup>74</sup> Perhaps one of the most poignant historical examples of this is

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69. This term is commonly used in analyzing districting and gerrymandering issues. See generally Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1385 (2012) [hereinafter Stephanopoulos, *Redistricting*]. Unlike the districting area where geographic boundaries have to be drawn, the geographic boundaries of states as “territorial communities” – the most fundamental for federalism purposes – are established. *Id.* at 1386; see also Stephanopoulos, *Spatial Diversity*, *supra* note 13, at 1922 n.74. (“community of interest” is based on ideology and is different from territorial community).

70. Stephanopoulos, *Redistricting*, *supra* note 69, at 1385; see also Stephanopoulos, *Spatial Diversity*, *supra* note 13, at 1974 n.288 (providing examples of communities that are bound together by culture and race).

71. This idea has been put forward by Justices Brandeis and O'Connor, among others. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (“[Federalism] promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’”).

72. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316-19 (1992).

73. *Id.* at 318-19.

74. Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 526-27 (2009).

the Court's decision in *Dred Scott v. Sanford*, in which the Court held that Missouri law *rather than federal law* governed the question of whether Mr. Scott was a free man after traveling to a free state.<sup>75</sup> Laws establishing state membership, of course, can be unconstitutional because they interfere with Congress' power to regulate in a field such as immigration, as they were in the recent cases in Arizona.<sup>76</sup> State membership laws can also violate the Equality Principles.

An individual's constitutional rights can be denied by a state even when the individual is clearly a state citizen. The internment of Japanese Americans during World War II is a poignant example. In *Korematsu v. United States*,<sup>77</sup> the Supreme Court upheld the detention of Japanese American citizens on the sole basis of race, a clear abridgment of their Equal Protection and Due Process rights.<sup>78</sup> Notice that issues of race and ethnicity gave rise to all of these iconic examples.

Importantly, as the Arizona immigration cases illustrate, while the Supremacy Clause requires state laws to be constitutional there is often a lot of leeway for individual states to function, to be "labs of experimentation," in ways that reflect their citizens' norms without violating the Constitution.<sup>79</sup> For example, a state might not provide for the death penalty as a form of punishment in its criminal justice system even though the Supreme Court has held that imposing the death penalty does not violate the Constitution.<sup>80</sup> Being a "death penalty" or a "non-death penalty" state is one part of a state's identity. Today, a fight between the states and the courts is being waged over whether states can maintain their identities as "no gun regulation" states.<sup>81</sup> States that want stricter gun regulations don't that identity as well.

To summarize thus far, state citizens, though also drawn together as a political unit because of their sovereignty, are drawn together by their more holistic sovereign identity that represents their histories, traditions, and cultures. Our history of slavery and racial inequality continues to shape the identity of many states, particularly the southern states. State citizens generally are proud to be members of their state even if they do not identify with particular aspects of their state's identity. Geographic identity is as real as it is mysterious. The mystery surrounding what it means to be from different

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75. 60 U.S. 393, 452 (1856) (finding that although citizenship for purposes of diversity jurisdiction in federal court is determined by federal law, the status of an individual as property or person is determined by the law of the state in which he resides or is owned).

76. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492 (2012).

77. 323 U.S. 214 (1944).

78. *Id.* at 219-20.

79. *See Arizona*, 132 S. Ct. at 2518-19.

80. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

81. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. (forthcoming 2014); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).



states is what federalism is all about; it also is at the center of the need for diversity jurisdiction.

### *B. Diversity Jurisdiction*

Diversity jurisdiction has always been controversial. Professor Charles Warren, one of the most notable scholars on federal jurisdiction, made an observation about the earliest debates over diversity jurisdiction that is worth reflection. He said: “There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists, or which had received so weak a defense from the Federalists as that which gave them power over ‘controversies between citizens of different states.’”<sup>82</sup> The Anti-Federalists’ struggle to keep diversity cases in state courts suggests a possible distrust of federal judges to adjudicate state issues. It also suggests the Anti-Federalists’ preference for their state judges to adjudicate cases involving their own citizens. Both suggestions are consistent with the most common perception about the need for diversity jurisdiction: bias.<sup>83</sup>

Ask first year law students why diversity jurisdiction exists and the answer is likely to be that the Framers provided for it in Article III because they feared state judges would be biased against non-resident litigants.<sup>84</sup> In other words, the perceived need for diversity jurisdiction rests on the premise that it allows an out-of-state litigant to escape the bias of a state judge who identifies with the in-state litigant simply because they are from the same state. The shared geographic identities of the judge and the in-state litigant could theoretically prevent the non-resident litigant from getting a fair trial.

As ingrained as this first year law school lesson is, no definitive answer seems to exist as to why the Framers provided for diversity jurisdiction involving citizens of different states, although it is clear that the whole grant of diversity jurisdiction in Article III was premised on state courts favoring their own litigants in party-based cases. In Federalist No. 80, Alexander Hamilton expressed his opinion:

[T]he reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens . . . The laws may have even prejudged the question, and tied the courts down to decisions in

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82. Purcell, *Class Action*, *supra* note 30, at 1829 n.19 (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923)).

83. *See* Warren, *supra* note 82, at 83.

84. *Id.*

favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.<sup>85</sup>

Chief Justice Marshall's opinion in *Bank of the United States v. Deveaux* reflects a similar sentiment:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suits, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.<sup>86</sup>

Feeding the bias premise is a common perception that state court judges lack judicial independence and are subject to political influence because they want to be reelected or reappointed.<sup>87</sup> In a recent article, however, Professor Brian Fitzpatrick persuasively demonstrates the fallacy of this assumption.<sup>88</sup> His work supports the view that, historically, "state court judges were elected and the vast majority of them enjoyed life tenure."<sup>89</sup> Most state judges, in other words, historically enjoyed the same protections of judicial independence as Article III judges. In fact, many federal judges at that time had experience as state judges.<sup>90</sup> Accordingly, when Congress initially provided for diversity jurisdiction in the Judiciary Act of 1789, it had little, if any, reason to be concerned about unfair judicial geographic bias.<sup>91</sup>

Congress and Hamilton were concerned, however, about state legislatures enacting laws that favored their own citizens and state juries being unfairly biased against creditors.<sup>92</sup> Diversity jurisdiction allowed out-of-state

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85. THE FEDERALIST No. 80, at 403 (Alexander Hamilton) (Ian Shapiro ed., 2009).

86. 5 U.S. (5 Cranch) 61, 87 (1809).

87. See Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 842 (2012).

88. See *id.* at 862.

89. *Id.* at 893.

90. *Id.* at 891.

91. See *id.* at 886-88.

92. *Id.* at 890; see also Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997 (2007) (suggesting jury bias was of greater importance to the Framers than judicial bias when deciding that federal courts, rather than state courts, should hear diversity claims).

litigants to avoid those biases. Prior to *Erie Railroad v. Tompkins*,<sup>93</sup> out-of-state litigants were able to avoid unfavorable state substantive law because under *Swift v. Tyson* Article III judges sitting in diversity cases could ignore unclear state laws and apply a general federal common law.<sup>94</sup> Even the Framers thought this was constitutional.<sup>95</sup> Moreover, defendants avoided state juries who were biased against creditors by seeking out the “more urban and pro-creditor federal jury pools.”<sup>96</sup> These more complex justifications for diversity jurisdiction generally are not part of the first year Civil Procedure course and students continue to learn the much simpler geographic identity bias justification.

Questioning whether the need to escape bias ever justified diversity jurisdiction, some scholars and practitioners suggest that even if bias was the original reason, today it is no longer applicable.<sup>97</sup> Specifically, being able to avoid local bias by filing a suit in, or removing it to, federal court to avoid unfavorable state substantive law has been obviated by *Erie* and its progeny.<sup>98</sup> From the *Erie* line of cases, and consistent with the Rules of Decision Act,<sup>99</sup> it is now clear that a federal judge hearing a diversity case is not free to ignore state substantive law.<sup>100</sup> Whether federal juries are less susceptible to local bias than state juries is an interesting question. Notice that the historical concern about jury bias was premised on the idea that both state and federal jury pools were biased, but for different reasons associated with geography and federalism.

In any event, many scholars and practitioners suggest that diversity jurisdiction should be abolished.<sup>101</sup> Astonishingly, this is not a modern debate; it has been going on since the Civil War.<sup>102</sup> As Professor Edward Purcell documents, some scholars take the position that diversity jurisdiction is theoretically indefensible;<sup>103</sup> however, practitioners have successfully lobbied to keep Congress from abolishing it.<sup>104</sup> From the practitioners’ point of view, escaping potential local bias is a legitimate reason to keep diversity jurisdic-

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93. 304 U.S. 64 (1938).

94. 41 U.S. 1, 18-19 (1842), *overruled by Erie*, 304 U.S. 64.

95. See Fitzpatrick, *supra* note 87, at 890.

96. *Id.*

97. See, e.g., *id.* at 890-93.

98. See *Erie*, 304 U.S. at 78.

99. 28 U.S.C. § 1652 (2006 & Supp. 2011).

100. *Id.* (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”)

101. See Purcell, *Class Action*, *supra* note 30, at 1829.

102. See *id.*

103. See *id.* at 1833-35.

104. See *id.* at 1848.

tion.<sup>105</sup> Indeed, attorneys have testified before Congress to express their concerns about this problem.<sup>106</sup> One attorney said, “I remove qualified cases to federal court . . . to avoid being ‘home-towned’ by the judge and/or jury.”<sup>107</sup> Some practitioners also contend that their clients’ needs are better served in federal court, and the attorneys themselves also prefer a federal forum.<sup>108</sup> There are many reasons an attorney or client might prefer a federal forum to a state forum.<sup>109</sup> In any event, a debate over the question of whether Congress *should* abolish diversity jurisdiction is intractable and variables other than the issue of local bias – such as expense and efficiency – enter into the discussion. Ultimately, whether Congress should abolish diversity jurisdiction is a policy question, and thus far those in favor of keeping it have prevailed.<sup>110</sup>

Much harder to answer, and more relevant to the local bias issue, is the question of whether Congress actually has the constitutional authority to abolish diversity jurisdiction. For purposes of this Article, one possible answer is that Congress does not have the authority to abolish diversity jurisdiction if a litigant has a right, perhaps as a matter of due process, to avoid the potential unfair local bias of a state court by choosing to have their case heard before an Article III judge. This view posits that the choice to go to a federal court under diversity jurisdiction is constitutionally protected by Article III and Congress thus cannot take it away.

As long as Congress does not abolish diversity jurisdiction, a definitive answer to whether it would have the authority to do so will remain elusive. Moreover, the association of diversity jurisdiction with the need to escape local bias persists even though there is scant, if any, empirical evidence to support the bias theory.<sup>111</sup> Professor Purcell aptly describes the current understanding of why diversity jurisdiction was created, stating, “The historical record gave sparse indication why the framers and ratifiers adopted the jurisdiction, and the scattered bits of evidence suggested only that they intended it to provide protection against some kind of bias or unfairness, real or anticipated, that non-residents might encounter in the states.”<sup>112</sup> Moreover, to the

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105. *See id.*

106. *See id.* at 1848 & n.89 (citing testimony before Congress).

107. Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 145 (2009).

108. *See* Purcell, *Class Action*, *supra* note 30, at 1846.

109. *Id.* at 1846; *see also* Seinfeld, *supra* note 107, at 138-39 (stating that a party might prefer federal or state procedural rules, for example).

110. Purcell, *Class Action*, *supra* note 30, at 1841-45, 1847-48 (illustrating the detailed history of attempts to abolish diversity jurisdiction).

111. *Id.* at 1847-48.

112. *Id.* at 1833 (internal quotation marks omitted); *see also* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 119, 123-24 (2003) (suggesting there is scant evidence to support the theory that diversity jurisdiction was created to avoid local bias, but neither is there evidence to support another reason for creating it).

extent bias is a concern, federal judges also are prone to it.<sup>113</sup> What is significant to highlight is that the perceived need to escape bias is centered solely on local bias associated with the state as a geographic unit.

This reality invites a closer examination of the concept of “bias.” Just as bias is a central concern in an exploration of states, federalism, and Article III, it also is a central concern in an exploration of individuals, equality, and Article III. Justice O’Connor’s comment from *Grutter* suggests that she agrees, at least to the extent that the experiences one has growing up in a region influences a person’s views in much the same way that being a racial minority influences one’s views.<sup>114</sup> Significantly, this Article builds on and strengthens the connections among federalism, equality, diversity, and Article III by exploring what “bias” means in the context of federalism and equality.

### III. BIAS

“Bias” tends to be an emotionally charged word, often associated with prejudice and unfairness. That is the sentiment behind diversity jurisdiction. However, the dictionary also defines “bias” as a “preference.”<sup>115</sup> Having a preference for something does not carry the same negative implications.

Accordingly, when questions about bias arise the real concern is not whether a judge (or a jury) is biased or has preferences, because they all do. This is referred to as “experiential” bias, meaning that people make decisions based on the knowledge they acquire from the experiences they have.<sup>116</sup> This is explored more fully below, but note that state judges and Article III judges have common geographic identities because of the way the Article III judiciary is structured, consistent with federalism.<sup>117</sup> Naturally, experiential bias is informed by myriad factors and influences in a person’s life.<sup>118</sup> This Article posits that geography – like race, sex, sexual orientation, and other identity traits – is an instrumental factor in shaping a person’s views.

This observation is supported by showing how concerns about bias in the context of diversity jurisdiction are remarkably similar to concerns about bias in the context of equality. Even though many state judges and Article III judges share similar geographic identities, states nevertheless have a federalism right to be represented on the Article III bench. Similarly, historically

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113. Purcell, *Class Action*, *supra* note 30, at 1847-49.

114. 539 U.S. 306, 333 (2003) (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”).

115. *Bias*, Collins English Dictionary – Complete & Unabridged 10th Edition Definition of Bias.

116. *Experiential*, Collins English Dictionary – Complete & Unabridged 10th Edition Definition of Experiential.

117. *See infra* Part III.B.

118. *See infra* Part III.B.

disenfranchised groups who have been the target of unfair bias (prejudice) also have an equality right to be represented on the Article III bench. This analogy is important because it exposes the similarities and differences between two constitutional values that are deeply associated with Article III.

### A. *Questions of Fairness*

Determining whether a judge is fair is a delicate evaluation. What information judges, especially Article III judges, rely on or should rely on to form their opinions is the concern of much debate and scholarly attention.<sup>119</sup> Are judges too ideological, wedded too much to originalism,<sup>120</sup> or not wedded enough? Recently, scholars have studied the extent to which judges rely on “intuition.”<sup>121</sup> Reasonable people will disagree over the “right” answers to some of these questions. Moreover, the debates over what is appropriate or inappropriate for judges to rely on in their decision making are not likely to end. However, two points about what judges *cannot* rely on as they make decisions are generally uncontested by reasonable people.

#### 1. Conflicts of Interest

First, judges cannot rely on their own abilities to avoid being unfairly biased in cases in which they have a conflict of interest with one of the parties. No matter how “good” a judge is, his or her ability to be fair in such situations will always be doubted and even the appearance of a conflict of interest ethically requires recusal.<sup>122</sup> In other words, a conflict of interest, or the appearance of a conflict of interest, deems a judge unfair. Justice Elena Kagan, for example, recused herself from several cases pending before the Court, including the *Arizona* and *Fisher* cases, because she had been involved with them in her position as U.S. Solicitor General.<sup>123</sup>

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119. See, e.g., Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013) (discussing originalism and non-originalism and what each group relies on to form its opinions).

120. See *id.* (offering a way to harmonize the debate over originalism versus non-originalism as the “right” method of constitutional interpretation).

121. See Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

122. 28 U.S.C. § 455(a) (2006 & Supp. 2011) (stating that federal judges are required to recuse themselves “in any proceeding in which [their] impartiality might reasonably be questioned”).

123. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan’s Recusals*, SCOTUSBLOG (Oct. 9, 2012, 9:50 PM), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/> (stating that Justice Kagan recused herself from twenty-eight out of seventy-five cases her first term).

## 2. Prejudice

Second, judges who are openly prejudiced against certain classes of people or particular issues also cannot rely on their own abilities to escape their prejudices in any given case. Being prejudiced is different from having a conflict of interest. “Prejudice” is used to mean an unfair bias where that bias is built on stereotypes or is anchored in negative feelings, perhaps even animosity, toward an individual or a group. A judge who is a member of the Ku Klux Klan, for example, cannot judge a race discrimination case fairly. The Court has held that legislation enacted out of prejudice<sup>124</sup> or animus<sup>125</sup> is unreasonable and unconstitutional. Poignantly, this formed the basis for the majority’s conclusion in *United States v. Windsor* that the Defense of Marriage Act “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those [same sex couples] whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>126</sup>

Similarly, judicial decisions based on prejudiced views are unreasonable. For example, in *Palmore v. Sidoti*, the Supreme Court remanded a case involving a Caucasian family, in which the state judge gave custody of a child to the father because the mother had cohabited with and then married an African-American man following the parents’ divorce.<sup>127</sup> The Court feared that decisions by a judge based on race were “more likely to reflect racial prejudice than legitimate public concerns.”<sup>128</sup> Some might argue that, with respect to judges being prejudiced, there is a difference between a state judge and an Article III judge. Because state judges are elected or appointed by an elected official (the governor), some might argue that the citizens of a state have a right to elect, directly or indirectly, a prejudiced judge. Undoubtedly, this is true. In fact, even legislation that is unconstitutional because it is based on prejudice has, on occasion, received a vote of support by a majority of the state citizens.<sup>129</sup> Again, that is part of the democratic process. But if a state judge renders a prejudiced opinion in violation of the Equality Principles, an appellate state judge is obligated to strike it down. If the Supreme Court is the ultimate arbiter in such cases, it also has the constitutional duty to correct the unfairness, as it did in *Palmore*.<sup>130</sup> The checks and balances built into the

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124. See, e.g., *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (requiring special use permit for home for “mentally retarded” was motivated by irrational prejudice because other institutions not required to get permits).

125. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (holding that Colorado Amendment Two denying equal protection to gays motivated by animus is unconstitutional).

126. 133 S. Ct. 2675, 2696 (2013).

127. 466 U.S. 429, 430-31, 434 (1984).

128. *Id.* at 432.

129. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (discussing anti-miscegenation laws).

130. See *Palmore*, 466 U.S. at 434.

judicial process ideally weed out prejudiced judicial decisions. Thus, while state citizens can use their voice to elect prejudiced judges, ultimately that voice will be drowned out by application of the Equality Principles at the appellate level.

Is this analysis different for Article III judges? Again, because the President and Senate, both majority institutions, are the guardians of the Article III bench, it is possible for prejudiced judges to be confirmed as Article III judges. Recently, Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit was accused of being racially biased because she allegedly said that African Americans and Hispanics are “predisposed to crime.”<sup>131</sup> Because of complaints challenging her ability to be fair, Chief Justice Roberts ordered a formal review of her record by the United States Court of Appeals for the District of Columbia Circuit.<sup>132</sup>

This example highlights how delicate issues of judicial bias can be. Reasonable people will disagree about whether Judge Jones’ comment reflects racial bias. But the call for an official review indicates how important it is for judges to be fair and to be perceived as such, regardless of “popular” sentiments. In the nomination process for Article III judges, a known prejudice typically is a severe handicap and dooms a nominee’s chances of successful confirmation. President Nixon’s nominations of both Clement Haynsworth of South Carolina and Harold Carswell of Florida failed because both men strongly supported racial segregation.<sup>133</sup> Reasonable people agree that a nominee who openly opposes the Equality Principles is unfit.

Moreover, as “good” as a judge is, and no matter how much a judge might think that he or she is able to put aside his or her prejudices, prejudices often operate on people in ways of which they are not even aware.<sup>134</sup> Critically important, no reasonable person would accept that a prejudiced judge could render a fair decision in a case that involved people or issues that aroused the judge’s prejudices. For example, regardless of the results of the D.C. Circuit’s formal review of Judge Jones, her integrity as a fair judge who is not racially prejudiced is impugned. The “experiential bias” of most African Americans and Hispanics will mean that these groups are likely to be especially critical of her impartiality. The integrity of our judicial system depends on people believing that it treats individuals fairly and equally.

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131. Stephanie Condon, *Conservative Judge Edith Jones up for Rare Review*, CBS NEWS (June 13, 2013, 4:41 PM), [http://www.cbsnews.com/8301-250\\_162-57589149/conservative-judge-edit-jones-up-for-rare-review/](http://www.cbsnews.com/8301-250_162-57589149/conservative-judge-edit-jones-up-for-rare-review/).

132. *Id.*

133. See *infra* notes 349-350 and accompanying text.

134. See *infra* Part VI.



*B. Experiential Bias*

Just as reasonable people agree that judges with conflicts of interest or known prejudices are likely to adjudicate unfairly and therefore should recuse themselves in appropriate cases, reasonable people also agree that judges are human beings whose experiences influence their views. Indeed, the basis for a prejudiced view, which is unreasonable, or a non-prejudiced view, which is reasonable, stems from an individual's experiences. For example, a person might have a negative experience with a person from a different racial group and unreasonably extrapolate from that experience to harbor negative sentiments toward other people in that racial group, or a person might be taught unreasonable and untrue lessons about particular groups. Sometimes learning such lessons is intentional, which is consistent with someone being knowingly prejudiced. Some parents, for example, teach their children to be racist. However, sometimes learning unreasonable and untrue lessons can be done unwittingly, and by very loving and equality-minded people. These kinds of lessons form the basis for unconscious bias, which is different from prejudice, but is also unfair.

Given that all people, including judges, are experientially biased, it is important to understand the concept of "unconscious bias." Identity scholars explore how a judge's unconscious bias – that is, a bias the judge is not even aware he or she has – can influence the judge's decision making in ways that promote inequality.<sup>135</sup> How someone can be "unconsciously" biased is not easy to understand. Continuing to use racial equality as an example, modern studies and legal jurisprudence<sup>136</sup> accept the existence and legitimacy of the concept of "unconscious racism."<sup>137</sup> Professor Charles Lawrence articulated the concept:

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135. See, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 500 (1998) (discussing how the visibility factor in the test for application of heightened scrutiny may accidentally promote inequality because those not discriminated against may not understand that utilizing visibility as a criterion for protection is impliedly demanding that "invisible" groups hide).

136. See *Developments in the Law – Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559-60 (1998). The seminal article on unconscious racism is *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*. See Lawrence III, *supra* note 34.

137. See, e.g., PROJECT IMPLICIT, <https://www.projectimplicit.net/index.html> (last visited Mar. 13, 2014). "Project Implicit" at Harvard University offers an online test that anyone can take to better understand the concept of implicit bias, including their own. *Id.* It also has an extensive bibliography on recent studies about implicit bias. *Project Implicit Publications*, PROJECT IMPLICIT, <https://www.projectimplicit.net/papers.html> (last visited Mar. 13, 2014).

A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. . . . [T]he lesson is not explicit: It is learned, internalized, and used without an awareness of its source. Thus, an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. . . . He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race.<sup>138</sup>

Meanwhile, Justice O'Connor opined in one of her dissents that "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."<sup>139</sup>

A judge who is openly racist, of course, falls into the prejudiced judge category. A judge who is not even aware that he or she falls into the unconscious racism arena typically is an equality-minded person who would never think of him or herself as racially prejudiced. Moreover, the equality-minded spectrum is broad. For example, most people might consider a person who uses the N-word racist; however, the controversy surrounding Paula Deen's admitted use of this word exemplifies how varied the views are on even this point.<sup>140</sup> One person, identified as a white man, in support of forgiving Ms. Deen, opined, "Everybody in the South over 60 used the N-word at some time or the other in the past."<sup>141</sup> Another supporter, an African-American woman, said, "I get it, believe me . . . But what's hard for people to understand is that she didn't mean it as racist . . . [t]hat's not what's in her heart. She's just from another time."<sup>142</sup> Understanding what is or is not "racist," of course, is one thing. But a decision based on unconscious racism is clearly unfair. This is the heart of identity scholarship's endeavor: to expose the hidden biases that otherwise come from "reasonable" people.

Moreover, unconscious unfair biased decision making, of course, is not limited to the area of race relations. The tendency to stereotype, consciously or unconsciously, is something most humans do. Modern studies demonstrate that most of us make decisions based on stereotypes in a matter of a split sec-

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138. Lawrence III, *supra* note 34, at 343 (internal quotation marks omitted).

139. *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

140. *See, e.g.,* Ann Oldenburg, *Fans Support and Defend Paula Deen*, USA TODAY (June 24, 2013, 9:42 AM), <http://www.usatoday.com/story/life/people/2013/06/24/fans-support-defend-paula-deen/2451559/>.

141. Kim Severson, *At Georgia Restaurant, Patrons Jump to Defend a Chef from Her Critics*, N.Y. TIMES, June 23, 2013, at A19, available at [http://www.nytimes.com/2013/06/23/us/in-the-south-many-are-willing-to-forgive-deens-racial-misstep.html?pagewanted=3Dall&\\_r=1&](http://www.nytimes.com/2013/06/23/us/in-the-south-many-are-willing-to-forgive-deens-racial-misstep.html?pagewanted=3Dall&_r=1&).

142. *Id.*

ond, perhaps without even knowing it.<sup>143</sup> Fortunately, our legal system, and in particular the Supreme Court, is increasingly sensitive to the need to eschew stereotypes because they undermine the Equality Principles.<sup>144</sup> Justice O'Connor's quotation exemplifies that we are making progress.

Thus, to be experientially biased – to have a point of view – because of one's identity is not cause for recusal; no one would be able to be a judge if it were. Experiential bias, then, is a natural part of judging. However, to be a fair judge requires a willingness to consider the possibility that one might be unconsciously biased.<sup>145</sup> Helping make equality-minded and loving people aware of this possibility is an enormous and daunting challenge. Speaking from my own experiences as a white person who cares deeply about racial equality and who has devoted her whole life to helping achieve it, I did not realize how unconscious racism worked *in my own mind* until I fell in love with my black daughter and started to bear witness simply living our daily lives.<sup>146</sup>

#### IV. *GRUTTER*'S LESSONS ABOUT FEDERALISM, DIVERSITY, EQUALITY, AND ARTICLE III

The inclusion of individuals and groups in the democratic process evidences a respect for their rights to have their experiential biases influence learning and decision making. While their inclusion is about representation and equality, it often is couched in terms of "diversity." In *Fisher v. University of Texas at Austin*, the Supreme Court was asked to decide whether the University of Texas unlawfully denied the equal protection rights of Abigail Fisher, a self-identified white applicant, because of her race when it denied her application for admission.<sup>147</sup> Under the University's admissions policy, University officials consider race as one factor among many in its efforts to admit a "diverse" class.<sup>148</sup> As mentioned earlier, the Court upheld the constitutionality of this type of admissions policy in *Grutter*.<sup>149</sup>

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143. See generally B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCH. SCI. 287 (2006).

144. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996). In striking down the Virginia Military Institute's exclusion of women as a denial of equal protection, Justice Ginsburg wrote for the majority that VMI's justification for the exclusion "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

145. See *infra* notes 256-257 and accompanying text (where Justice Sotomayor emphasized that she would strive to be impartial and fair even though she had said that her experiences as a Latina did influence her views).

146. I detail this in my book, SHARON E. RUSH, *LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE* (2000).

147. 133 S. Ct. 2411, 2415 (2013).

148. *Id.* at 2416-17.

149. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

The *Fisher* Court, in a 7 to 1 decision,<sup>150</sup> held that both lower courts erred by giving too much deference to the University's assertion that it operated in "good faith" in administering the admissions policy.<sup>151</sup> The *Fisher* Court agreed with *Grutter* that it is a university's decision whether to consider race in its admissions policy in order to admit a diverse class, but once it has made that decision and it is challenged in court a judge must determine if the university's method of achieving this objective meets strict scrutiny.<sup>152</sup> The university has the burden of proof to establish that the method it chose to achieve its goal of diversity is narrowly tailored.<sup>153</sup> In other words, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>154</sup> Understanding the relationship between equality and diversity helps to distinguish between prejudice and experiential bias. Toward this end, and because *Fisher* affirms *Grutter*, it is useful to analyze seven valuable lessons from these cases.

#### A. Lesson One: Diversity and Equality Are Related

The *Grutter* and *Fisher* Courts' affirmation of the connection between diversity and equality is significant and related to the major point of this Article. Just as federalism has strong connections to race and geography, the most natural and logical starting point for understanding equality is in the context of race and racial equality. The concept of diversity found its way into Fourteenth Amendment jurisprudence through the Equal Protection Clause.<sup>155</sup> More fully, the Fourteenth Amendment was added to the Constitution to establish the rights of the newly-freed slaves to be full citizen participants in our democracy.<sup>156</sup> It marked the beginning of our democracy's commitment to include the voices of racial minorities, particularly the newly freed slaves, in shaping the law. They became free to represent themselves. In the *Slaughterhouse Cases*, the Court, in its first interpretation of the Four-

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150. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Alito, Breyer, Scalia, Sotomayor, and Thomas. *Fisher*, 133 S. Ct. at 2414. Justice Ginsburg dissented and Justice Kagan recused herself due to a conflict of interest. *Id.*; see also Adam Liptak, *Justices Step Up Scrutiny in College Entry*, N.Y. TIMES, June 24, 2013, at A1, [http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?\\_r=0](http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?_r=0).

151. *Fisher*, 133 S. Ct. at 2421 ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications . . .").

152. *Id.* at 2421.

153. *Id.*

154. *Id.* at 2420.

155. See U.S. CONST. Amend. XIV, § 1.

156. See generally Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389 (2004).

teenth Amendment, opined that if the Equal Protection Clause was intended to protect anyone, surely it was intended to protect the newly-freed slaves from discrimination on the basis of race.<sup>157</sup>

Since *Slaughterhouse*, it is clear that all racial groups are protected from discrimination. This seems perfectly logical because all people have a race. But it was not until Allan Bakke, a self-identified white person, challenged the University of California Davis School of Medicine's admissions policy, which set aside sixteen of 100 seats for racial minorities, that diversity in public education became a popular concern about racial equality.<sup>158</sup> While the Court held that the set-aside program denied Bakke equal protection,<sup>159</sup> the opinion provided much fodder for the Justices about the value to U.C. Davis of having a racially diverse medical school class<sup>160</sup> and what level of review the policy had to meet in order to pass constitutional muster.<sup>161</sup> Some Justices distinguished affirmative action laws that were intended to help racial minorities from racial discrimination laws that hurt minorities.<sup>162</sup> A plurality held that this distinction justified applying an intermediate standard of review to affirmative action policies.<sup>163</sup> Justice Powell, voting with the plurality, wrote separately to opine that the set-aside policy, because it was a racial classification, should be subject to strict scrutiny just like any classification based on race.<sup>164</sup> Moreover, while he would not have upheld the set-aside, he did think it would be constitutional for a public college to consider an applicant's race as one factor among many in a holistic review of an application – in essence, the holding adopted by *Grutter*.<sup>165</sup> "Diversity" thus became a compelling state interest that can be pursued as long as a public university does not violate the Individual Equality Principle.<sup>166</sup>

### B. Lesson Two: Diversity Overshadows Equality

The *Bakke* and *Grutter* Courts paved the way for the concept of "diversity" ultimately to substitute for "equality" in the context of race and public university admissions processes.<sup>167</sup> Ironically, the *Grutter* Court did this primarily by relying on Justice Powell's concurrence in *Bakke* and affirming the constitutionality of the University of Michigan Law School's holistic

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157. The Slaughter-House Cases, 83 U.S. 36, 81 (1872).

158. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 275-79 (1978).

159. *Id.* at 320.

160. *Id.* at 312-16.

161. *Id.* at 288-90.

162. *Id.* at 363-68.

163. *Id.* at 359-62.

164. *Id.* at 290, 320.

165. See *id.* at 318.

166. See *id.* at 314-15.

167. See Sharon E. Rush, *Diversity: The Red Herring of Equal Protection Analysis*, 6 AM. U. J. OF GENDER & THE L. 43 (1998).

definition of “diversity.”<sup>168</sup> While a holistic definition of diversity includes racial diversity, diversity is different from, albeit related to, equality. This shift in focus confuses the significance of the difference between the Individual Equality Principle and the Group Equality Principle even as it simultaneously acknowledges the importance of each. In the affirmative action context, the Individual Equality Principle is affirmed because each individual is entitled to equal protection. Typically, the plaintiff in such cases is white. On the other hand, the Group Equality Principle is affirmed because the Court held that admitting a diverse class, including a racially diverse class, is a compelling state interest. Typically, racial diversity is achieved when racial minorities are included in a predominantly white class.

Both Equality Principles, however, are overshadowed by the very concept of diversity. This is because most characteristics of an individual, as valuable as they are and as much as they contribute to diversity, have nothing to do with equality. Consider talent; undoubtedly, the talents that applicants bring to the university enrich the school’s environment. If a college wants an athletics program, it has to admit applicants who play sports. Accordingly, it is easy to see the link between talent and diversity; however, that does not mean that there is a constitutional link. The most talented football player does not have a claim of talent discrimination if he is denied admission to a public university while an applicant with no football talent is admitted. This is true even if the university sets aside a certain number of seats and scholarships for applicants who do not play football.

An applicant from State A who is denied admission to Public University C when an applicant from State B is admitted would similarly not have a geographic discrimination suit even if the applicant from State A was clearly “more qualified” according to the University’s admissions metrics. Significantly, though geographic identity is constitutionally important, and in this way is more like race than talent, it is not constitutionally protected. Recall Justice O’Connor’s statement in *Grutter* in which she linked geographic and racial identity and opined that both are important and shape an individual’s views<sup>169</sup> – once the focus shifts from equality to diversity, however, anything that makes an individual unique can be thrown into the diversity melting pot. The Equality Principles remind us, however, that no matter what identity traits might go into that pot, “racial identity” clearly cannot be taken out of it.

Unfortunately, there is a huge negative consequence that results from this shift – the increased commodification of racial identity. Professor Nancy Leong’s recent article entitled “Racial Capitalism”<sup>170</sup> explains that valuing

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168. *Grutter v. Bollinger*, 539 U.S. 306, 307-09 (2003).

169. *Id.* at 333.

170. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013). Prof. Leong states, “In a society preoccupied with diversity, nonwhiteness is a valued commodity. And where that society is founded on capitalism, it is unsurprising that the commodity of nonwhiteness is exploited for its market value.” *Id.* at 2154; see

diversity just for the sake of increasing the number of racial minorities in a white institution privileges whites.<sup>171</sup> For example, it allows white institutions to hold themselves out as non-racist.<sup>172</sup> Furthermore, the justifications for this shift suggest that the inclusion of racial minorities in white classrooms is to benefit white students who “need” to learn about racial differences to enhance their own chances for success in the real world.<sup>173</sup> I agree with Professor Leong that the current understanding by most whites and white institutions that diversity is valuable is somewhat superficial.<sup>174</sup> If equality were truly the reason for valuing diversity, then institutions would work hard to change their cultures.<sup>175</sup> Because diversity has become so prevalent, however, the discourse is unlikely to shift back to equality. It is critically important, however, to remember and to stress that racial diversity is firmly rooted in the Equality Principles. It is from this perspective that I suggest that the reasoning of *Grutter* is premised on having the experiential bias of all students, including racial minority students, engaged in classroom discussions consistent with the Group Equality Principle.

This Article suggests that federalism insists that, like racial identity, geographic identity cannot be taken out of the melting pot with respect to the Article III judiciary and its role in protecting the equality of states as well as the Equality Principles.

### *C. Lesson Three: Individual and Group Identity Inform Experiential Biases*

An individual’s experiences relate not just to what the individual experiences as an individual, but also to what he or she experiences as a member of various groups. The concepts of individual identity and group identity are both related and distinct. The Individual Equality Principle and the Group Equality Principle highlight the importance of this distinction.

Mediating the distinction between individual and group identity is challenging, because it is human nature to group people – to stereotype or “essentialize” them – based on their shared identity traits. But stereotyping is unfair. It is common knowledge, for example, that Justice Thomas is criticized by people who assert that he does not “think like a black man” because of his

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Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. (forthcoming 2014).

171. Leong, *supra* note 170 at 2155.

172. *Id.* at 2179.

173. *See id.*

174. *Id.* at 2169-70. This is what Prof. Leong calls the “thin” version of diversity, distinguishing it from the “thick” version which “views diversity as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships, thereby benefiting institutions and individuals of all races.” *Id.* at 2169.

175. *See id.* at 2170-71.

conservative views.<sup>176</sup> This criticism, of course, essentializes all blacks and assigns each a single voice that speaks the “black view.” This is ridiculously unfair on the individual level because each individual’s experiential bias is unique to that individual’s life experiences. Even identical twins, raised in the same environment, are still independent thinkers.<sup>177</sup> It is fundamentally unfair to expect them to be of the same mind as if they were one person.

Simultaneously, group membership is relevant to the influences of experiential bias because an individual’s group membership has a powerful influence on the individual’s life experiences. A black man, for example, has a far greater chance of being stopped by the police than a white woman. In the aftermath of the shooting of Trayvon Martin by George Zimmerman, President Obama shared on national television that he had been the target of racial profiling and even commented that “Trayvon Martin could have been me 35 years ago.”<sup>178</sup> Parents of white children do not have to confront the unfair reality of racial profiling. This reality, although unfair, says nothing about how an individual black man who is pulled over would vote for a political candidate or evaluate a legal problem. This also helps in understanding why it is important to have a “critical mass” of racial minorities in a classroom. While each individual’s experiences are unique to the individual, group members share a common bond about what it means to be a member of that group. Notwithstanding his conservative views that do not align with majority black politics, Justice Thomas emphatically claimed his black identity in *Grutter* when he quoted Frederick Douglass’ plea to abolitionists to leave blacks alone and let them stand on their own achievements.<sup>179</sup>

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176. See Tomiko Brown-Nagin, *The “Transformative Racial Politics” of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 787 (2005).

177. See James. M. Olson, Philip A. Vernon, Julie Aitken Harris & Kerry L. Jang, *The Heritability of Attitudes: A Study of Twins*, 80 J. OF PERSONALITY & SOC. PSYCH. 845, 859 (2001) (“Attitudes are learned. But attitudes also depend on biological factors.”).

178. Michael Winerip, *President Obama, Race and the Ku Klux Klan*, N.Y. TIMES, July 22, 2013, [http://www.nytimes.com/2013/07/22/booming/president-obama-race-and-the-ku-klux-klan.html?\\_r=0](http://www.nytimes.com/2013/07/22/booming/president-obama-race-and-the-ku-klux-klan.html?_r=0).

179. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part & dissenting in part). Frederick Douglass’ speech:

“[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . .”

*Id.*



Thus, experiential bias acknowledges that an individual can belong to a particular group but still hold views that are out of sync with those of the group. The *Grutter* Court's broad definition of "diversity" that includes identity traits that clearly are not constitutionally protected acknowledges that a person's identity – in a holistic sense – is based on myriad factors, including race.<sup>180</sup>

*D. Lesson Four: Grutter and Fisher Are Federalism Cases, Too*

Significantly, *Grutter* actually is a federalism case because the Court did not hold that states must consider race in their public university admissions.<sup>181</sup> Consistent with federalism and the individuality of states, the Court left it to the states to decide whether they want to consider race in their public university admissions.<sup>182</sup> If a state chooses to consider race, then it must make race only one factor among many, consistent with the Individual Equality Principle.<sup>183</sup> Ultimately, though, the choice to be or not to be an "affirmative action" state is made by the state and becomes part of its identity. Thus, connecting equality and diversity with federalism is fairly easy.

Seeing how geographic identity is tied in to the mix is fuzzier. Clarity is added by understanding that, although the link between geographic identity and equality is relevant to the Fourteenth Amendment, it does not actually derive from it. Rather, the link originates from federalism principles that are reflected in Article III. For example, Article III links state sovereignty with a criminal defendant's equality by requiring that criminal trials be heard in the state where the crime was committed.<sup>184</sup> Jury selection in criminal trials also links geography, federalism, and equality by limiting the selection to certain geographic areas.<sup>185</sup> In turn, Article III judges, through their experiential biases, protect the Equality Principles.

*E. Lesson Five: Diversity Helps to "Unlearn Prejudice"*

It is an individual's life experiences, which are shaped by race, sex, sexual orientation, religion, geography, talent, and so forth, that enrich the classroom experience for all students. In other words, the *Grutter* Court held that states are allowed to value – that is, have a compelling interest in – the reality

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180. *See id.* at 338-39.

181. *See id.* at 343.

182. *See id.*; *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (holding that a state constitutional amendment to ban the use of race in state university admissions is constitutional because without a constitutional violation, neither the U.S. Constitution nor precedent provided any basis on which a federal court could overturn a state's law).

183. *See Grutter*, 539 U.S. at 337-38.

184. U.S. CONST. art. III, § 2, cl 3.

185. U.S. CONST. amend. VI.

that a person's race (and other identity traits) affects the way in which he or she experiences the world, and that sharing those experiences in an educational setting enriches the learning environment.<sup>186</sup> Again, I emphasize that diversity is about equality.

Moreover, building on Gordon Allport's pioneering work on prejudice, studies repeatedly show that one of the best ways for anyone, particularly children, to avoid learning prejudice toward particular groups is to interact with those groups.<sup>187</sup> His conclusions are worth noting:

Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom, or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.<sup>188</sup>

Recent studies also indicate that even "indirect" or "imaginary" contact is helpful to promote healthy race relations.<sup>189</sup> For example, if one person in a group befriends a person from an out-group, other members of the in-group have increased positive attitudes about the out-group.<sup>190</sup> "Whereas positive direct intergroup contact can transform the participating individuals' attitudes, one in-group member's friendship with an out-group member can have a cascading and almost viral influence as other in-group members learn of this friendship (or experience contact indirectly)."<sup>191</sup> Significantly, though, this observation means that at least one person from the in-group has to have direct contact with a member of the out-group for an "indirect" effect.<sup>192</sup> Alternatively, for someone to imagine having a positive relationship with someone from an out-group, the person must have positive visions, through media or other means, of interracial relationships.<sup>193</sup>

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186. See *Grutter*, 539 U.S. at 330.

187. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (25th anniversary ed. 1979).

188. *Id.* at 281.

189. See, e.g., John F. Dovidio, Anja Eller, & Miles Hewstone, *Improving Intergroup Relations Through Direct, Extended and Other Forms of Indirect Contact*, 14 *GROUP PROCESSES & INTERGROUP RELATIONS* 147, 148 (2011).

190. *Id.* at 150.

191. *Id.* at 148; see also Thomas F. Pettigrew, Linda R. Tropp, Ulrich Wagner & Oliver Christ, *Recent Advances in Intergroup Contact Theory*, 35 *INT'L. J. OF INTERCULTURAL RELATIONS* 271, 277 (2011).

192. See Dovidio, *supra* note 189, at 148.

193. *Id.* at 158.

A primary goal of *Brown v. Board of Education* was to integrate the public schools as part of the struggle to achieve racial equality.<sup>194</sup> Allport's studies fully support those efforts by suggesting that:

[T]o perceive the real problems in race relations for what they are marks a distinct gain. While they are difficult to solve, they stand a better chance of being solved if the irrelevancies of stereotype and autistic hostility are first eliminated. And to achieve this gain the abolition of segregation helps greatly.<sup>195</sup>

Racially integrated schools allow children to step up to, and even cross over, the color line, and studies like those of Allport show that this is one of the best ways for them to learn how to navigate it. Arms-length or abstract interracial lessons allow unconscious (or conscious) biases to fester. As Professor Nienke Grossman said, "[t]he mere presence of excluded groups can counteract both actual bias and perceptions of bias."<sup>196</sup> Certainly, to the extent we continue to allow our public schools to be largely segregated and woefully unequal, we condone the message to our children that racial and economic inequality are not important enough to fix. The burdens of this message fall disproportionately on children of color. This is a resounding message about racial inferiority and superiority, a lesson that presumably loving adults and equality-minded people would never explicitly condone.<sup>197</sup>

Moreover, learning how to manage and develop healthy race relations is a sign of high emotional intelligence.<sup>198</sup> In reality, children of color have a head start on most white children in understanding race relations because they are forced to navigate the color line every day of their lives. Many white children do not even have to think of race because their whiteness is like the invisibility cloak in *Harry Potter*<sup>199</sup> and hides them from the daily racial strife. Yet every loving parent wants his or her child to have high emotional intelligence because it is key to effective leadership. Some journalists have written

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194. 347 U.S. 483, 493 (1954).

195. Allport, *supra* note 187, at 274.

196. Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of the International Court?*, 12 CHI. J. I. L. 647, 665 (2012).

197. See generally Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMPLE POL. & CIVIL RTS. L. REV. 71 (2010).

198. See generally DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (10th anniversary ed. 1995); see also Sharon E. Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 5 (1997).

199. J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 201 (1999).

about President Obama's high emotional intelligence,<sup>200</sup> which is not surprising precisely because he has had to mediate the color line throughout his political career. In contrast, as smart and successful as Governor Romney is, according to political analysts his presidential campaign failed, at least in part, because he and his advisors did not understand critical aspects of the power dynamic between historically privileged groups and racial minorities, immigrants, and even women.<sup>201</sup> It is hard to unlearn prejudice or unfair bias, especially for equality-minded people who often do not fully understand how their thinking about other people can be unreasonable. Certainly, diverse (integrated) classrooms offer hope that the next generation will have healthier and more equal relationships because they will have learned what respect for others truly means: a shared human dignity.

*F. Lesson Six: The Holding in Fisher Is Irrelevant to Diversity Goals*

This analysis does not change because of the *Fisher* Court's decision. The *Fisher* Court could have ruled for or against *Fisher* on the facts and kept the basic holding of *Grutter* intact, or it could have held that the Constitution prohibits states from considering race in their public university admissions processes. An affirmation of *Grutter* reinforces, from the Constitution's perspective, the reality that group racial identity – the Group Equality Principle – is at the heart of diversity in public education. Moreover, it also reinforces the importance of federalism and state sovereignty because each state may choose whether or not to consider race in university admissions.<sup>202</sup>

But even if the *Fisher* Court had overruled *Grutter* and held that race cannot be considered in public university admissions processes, it would not mean that individual racial identity is no longer protected under the Constitution. The Individual Equality Principle would survive, in that it still would be unconstitutional to discriminate on account of race. Indeed, *Fisher*'s suit was brought under a claim of racial discrimination through the current admissions policy, and probably would have been the Court's rationale for overruling *Grutter* if it had done so; to consider race in state university admissions even as one factor among many would be race discrimination. No state, then, would be able to identify as an "affirmative action" state as that phrase is commonly understood.

But what would overruling *Grutter* do to the Group Equality Principle and federalism? Importantly, even if the *Fisher* Court had denied states the choice to consider race in their public school admissions processes, it is un-

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200. See, e.g., Chris Bolis, *The Emotional Intelligence of President Obama*, CBS MONEY WATCH (May 13, 2011, 7:30 PM), [http://www.cbsnews.com/8301-505125\\_162-31147537/the-emotional-intelligence-of-president-obama/](http://www.cbsnews.com/8301-505125_162-31147537/the-emotional-intelligence-of-president-obama/).

201. See, e.g., *Hope Over Experience: A Divided Country Gives Obama a Second Chance*, WALL ST. J. (Nov. 8, 2012, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052970204349404578102971575770036>.

202. See *supra* note 182 and accompanying text.

likely that diversity, including racial diversity, would have become irrelevant to public institutions.<sup>203</sup> It is worth emphasizing that the underlying rationale for the *Grutter* Court's decision is that a racially diverse class enriches the learning environment, in that students can share experiences gained from their racial identities.<sup>204</sup> Every student in the classroom has experiential bias based on race and myriad other factors.

Naturally, classrooms have always been filled with students who have unique experiences to share with each other. *Grutter*'s focus on including the experiences of racial minorities simply highlights the need, in a democracy that values equality and representation, to acknowledge that the experiential biases of these minorities are just as valuable as those of other students – including white students – in enriching the learning environment. *Grutter* exposes this history and the hidden assumption behind excluding racial minorities from certain public universities: that only white students' experiences have ever mattered.

Moreover, just as experiential bias has always formed the basis of the classroom learning environment, the importance of including the experiences of racial minorities (and thus striving to meet the Group Equality Principle) will not evaporate if *Grutter* is overruled, as it probably will be someday. State universities understand this reality. While a future Court might make it unconstitutional for a state to hold itself out or identify itself as an "affirmative action" state, all states have chosen to identify as "diversity" states. My research efforts did not find one state, through its public university or college websites, that did not value diversity. Indeed, go to any public college or university website and inevitably it will hold itself out as an institution that seeks a diverse student body. In fact, the University of Wisconsin-Madison recently admitted that it altered a photo to include racial minorities for the sole purpose of holding itself out as an institution that values racial diversity.<sup>205</sup> While a future Court decision might present challenges to the way in which diversity, especially racial diversity, is achieved, achieving diversity – or meeting the Group Equality Principle – is ostensibly a priority for all state universities. Moreover, because the racial demographics in the United States are becoming more and more diverse, it is unlikely that diversity will become less important.

Valuing diversity is a reasonable, sound, and realistic choice. As Professor Leong details in her recent article, however, diversity must be valued

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203. See Leong, *supra* note 170, at 2166. (society has accepted diversity for so long now that it is "beyond the legal realm").

204. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

205. See Lisa Wade, *Doctoring Diversity: Race and Photoshop*, THE SOCIETY PAGES (Sept. 2, 2009, 10:48 AM), <http://thesocietypages.org/socimages/2009/09/02/doctoring-diversity-race-and-photoshop/> (University of Wisconsin photo-shopped picture of an African American male into football game crowd and used in its admissions booklets).

for the right reasons and not just for the sake of appearing non-racist.<sup>206</sup> And, because public institutions can choose to be diverse, their decisions support federalism. Studies show that many, if not most, environments, particularly those that provide services to the public, strive to be diverse. The military is a leader in understanding the importance of diversity, and Congress recently created “The Military Leadership Diversity Commission” to try to increase diversity at the more senior levels.<sup>207</sup> Businesses want diverse workforces, and a recent McKinsey report shows why: “U.S. companies with the highest executive-board diversity had returns on equity 95 percent higher and earnings margins 58 percent higher, on average, than those with the least executive diversity.”<sup>208</sup> Public schools at all levels also want diverse student bodies. In fact, some schools wanted it badly enough that they used voluntary integration plans to try to achieve it; however, the use of such plans was struck down by the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>209</sup> Even “non-affirmative action” states – those states where citizens have already exercised their sovereignty to prohibit the use of race in admissions – want their public institutions to be diverse and go to enormous efforts and expense to meet their goals.<sup>210</sup> If diversity is not

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206. Leong, *supra* note 170, at 2155.

207. Lisa Daniel, *Panel Recommends Ways to Improve Military Diversity*, U.S. DEP’T OF DEFENSE (Mar. 8, 2011), <http://www.defense.gov/News/NewsArticle.aspx?ID=63065>.

208. Karen E. Klein, *How ‘Diversity Fatigue’ Undermines Business Growth*, BLOOMBERG BUSINESSWEEK, SMALL BUSINESS (May 14, 2012), <http://www.businessweek.com/articles/2012-05-14/how-diversity-fatigue-undermines-business-growth>.

209. 551 U.S. 701, 709 (2007).

210. The University of Florida is an excellent example. Florida operates under “One Florida,” an executive order by Governor Jeb Bush and approved by the legislature that prohibits the use of race in public university admissions since 2000. See Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. Times (Feb. 4, 2000), <http://www.nytimes.com/2000/02/04/us/jeb-bush-roils-florida-on-affirmative-action.html>. Nevertheless, diversity is extremely important to the University. It has a Multicultural & Diversity Affairs office and a Council on Diversity. *Multicultural & Diversity Affairs*, UNIV. OF FLA. DIV. OF STUDENT AFFAIRS, <http://www.multicultural.ufl.edu/> (last visited Mar. 19, 2014); *President’s Council on Diversity*, UNIV. OF FLA. HUMAN RES. SERVS., <http://hr.ufl.edu/manager-resources/recruitment-staffing/institutional-equity-diversity/presidents-council-on-diversity/> (last visited Mar. 19, 2014). Although race cannot be considered in the admissions process, successful recruitment of minorities depends, to some extent, on the University being a diverse environment so that prospective students, staff, and faculty want to come to the University. See Leong, *supra* note 170 at 2184. That is consistent with Prof. Leong’s thin understanding of diversity. See *id.* at 2169-70. But the University values diversity in a much more substantive way also, and has implemented meaningful laws, rules and regulations to create an environment that is equal for everyone. *Multicultural & Diversity Affairs*, UNIV. OF FLA. DIV. OF STUDENT AFFAIRS, <http://www.multicultural.ufl.edu/> (last visited Mar. 19, 2014). For a southern state university, this

going to be associated with racial equality principles under the Constitution, as a society we nevertheless seem to operate on the premise articulated by the *Grutter* Court that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>211</sup> Certainly, diversity as a holistic concept, where race is only one part, seems to be here to stay. Leaders who exercise good business and democratic judgment support diversity.

*G. Lesson Seven: This All Relates to the Article III Judiciary*

The effective leader who supports diversity understands that diversity is about representation and legitimacy. A business that employs no women can say that it does not discriminate on the basis of sex, but it would be hard to believe such a claim. Even if such a business did not discriminate, it would appear to discriminate. And geographic identity matters in this regard, too. Imagine how valid it would be to question the legitimacy of an international court if all of the judges on the court were from the same country.<sup>212</sup> Even if the judges were impartial, they would appear unfairly biased because the views of judges from other countries would be excluded.<sup>213</sup> To have legitimacy as an international court, the judges must be representative of the international community and come from different countries precisely because of their experiential diversity. Similarly, in order to have legitimacy, the experiential biases that attach to judges because of their geographic identity (and other identity traits) must be equally represented on the Article III bench.

So it is with states and Article III courts in the United States. Professor Sherrilyn Ifill pointed out that a circuit court of appeals would appear unfairly biased if it was comprised of judges from only one state, because the other states in the circuit would be unrepresented on the bench.<sup>214</sup> This Article extends this concept – because each state is independently sovereign and has its own identity, the absence of a state resident as an Article III judge on the appellate bench unconstitutionally excludes that state’s right to bring its experiential and fair state-identity bias to the decision-making process. Congress recognized this and therefore requires by law that each state have a minimum of one resident on each of the circuit courts of appeal.<sup>215</sup>

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change in culture has been slow, but it is changing. See Leong, *supra* note 170, at 2195-96.

211. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

212. See Grossman, *supra* note 196, at 668.

213. *Id.*

214. See Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 47 (2009).

215. 28 U.S.C. §44(c) (2012) (“In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit.”).

Presidents and citizens want diverse Article III courts – diverse in a holistic and experiential sense.<sup>216</sup> The structure of the Article III system at the lower court levels adds legitimacy to the Article III judiciary because all of the states are represented in the system. Substantively, federal judges who are citizens of the states in which they sit also bring their “local spirits” to the federal bench; this is not a matter of unfair prejudice, but rather a matter of identity shaped by experiences and associated pride. A judge’s geographic identity adds federalism value to the bench, and because the nation is comprised of fifty states, each of those geographic identities belongs on the federal bench.

## V. BIAS AND FEDERAL JURISDICTION

### A. *Diversity Jurisdiction*

The reality of the potential for unfair local bias – conscious or unconscious, and however remote – offers some support for diversity jurisdiction. When Alexander Hamilton expressed his concern that the “local spirit(s)” might unduly influence state judges to favor their states over the federal government,<sup>217</sup> he might have been expressing a concern about conscious or unconscious unfair bias. In any event, the idea behind diversity jurisdiction is that a state judge will identify with a litigant from their state such that their shared geographic identity creates an “us versus them” dichotomy within the lawsuit. The shared geographic identity between the judge and local resident, so the theory goes, binds them so strongly that it is assumed the judge “will find a way,” perhaps unwittingly, to rule in favor of the resident. The Article III provision for diversity jurisdiction in federal court provides an out-of-state litigant with a way to avoid this risk. Thus, Congress’ unwillingness to abolish diversity jurisdiction is defensible if the potential for unfair bias exists. An Article III judge would be impartial – at least theoretically.

Significantly, Article III judges, with a few exceptions, are required by Congress to be residents of the states wherein they preside;<sup>218</sup> thus, they also

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216. See generally Ifill, *supra* note 214 (stating that diversity in a holistic sense, including racial, gender and geographic, enhances the legitimacy of the Court).

217. THE FEDERALIST NO. 81, at 544 (Alexander Hamilton) (Paul Leicester Ford ed., 1898); see Seinfeld, *supra* note 107, at 113 n.54.

218. For court of appeals judges, see 28 U.S.C. §44(c) (2012) (“Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.”). For district court judges, see 28 U.S.C. § 134(b) (2012) (“Each district judge, except in the District of Columbia, the Southern District of New York, and the Eastern District of New York, shall reside in the district or one of the districts for which he is appointed. Each district judge of the Southern District of New York and the Eastern District of New York may reside within 20 miles of the district to which he or she is appointed.”).



share a geographic identity with the plaintiff and presumably have the potential to be just as unfairly biased as state judges.<sup>219</sup> Theoretically, the shield that guards against unfair bias stemming from shared geographic identities is the fact that the Article III judge is not elected and also enjoys life tenure and salary protection. Admittedly, an Article III judge has no motivation to rule for the local resident in order to curry favorable support in the next election. But neither did most state judges at the time because they enjoyed similar metrics of judicial independence.<sup>220</sup>

### B. Federal Question Jurisdiction

Ironically, some of the best evidence of the importance of states' voices in the national government comes from highlighting a few points about concurrent federal question (general arising under) jurisdiction. Initially, Congress did not extend federal question jurisdiction to federal courts because of both a fear of putting too much power in the national government, and for reasons of expense.<sup>221</sup> Interestingly, though, there seemed to be an understanding that state court judges were capable of deciding federal question cases.<sup>222</sup> The best evidence of this lies in the Madisonian Compromise between the Federalists and the Anti-Federalists – an agreement, reflected in Article III, to establish one Supreme Court and otherwise give Congress discretion to create lower federal courts.<sup>223</sup> Obviously, in the absence of lower federal courts, the presumption was that federal question cases would be heard in state courts.<sup>224</sup> Alexander Hamilton also espoused his view that states should enjoy concurrent federal question jurisdiction.<sup>225</sup>

For about one year, from 1801 to 1802, Congress did grant federal courts jurisdiction over federal question cases;<sup>226</sup> it was not until 1875 that Congress made federal question jurisdiction concurrent.<sup>227</sup> Congress also was motivated to give federal courts federal question jurisdiction at the time because it believed that states would be biased against federal claims.<sup>228</sup> But

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219. Purcell, *Class Action*, *supra* note 30, at 1847-48.

220. *See supra* notes 86-91 and accompanying text.

221. *See* Fitzpatrick, *supra* note 87, at 890.

222. *See id.*

223. Purcell, *Class Action*, *supra* note 30, at 1825.

224. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 47, 55 (1975).

225. THE FEDERALIST NO. 82 (Alexander Hamilton).

226. *See* Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (creating arising under jurisdiction), *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

227. 28 USC § 1331 (2012); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012) (noting that federal courts have possessed federal question jurisdiction since 1875).

228. Seinfeld, *supra* note 107, at 102-06.

Congress' timing, of course, was not a coincidence. The Civil War had just ended, the Reconstruction Amendments were added to the Constitution, and there was concern regarding whether the newly-freed slaves would receive justice in some states' courts as they exercised their new constitutional rights.<sup>229</sup> After all, the geography of slavery had significantly impacted not just states' identities, but individuals' identities as well. Enslaved blacks, legally classified as property, were confined to certain spaces and largely kept out of the public spaces that were reserved for whites. When a slave was able to cross geographic boundaries into a "free" state or territory, the Supreme Court upheld the master's right to return the slave to the master's home.<sup>230</sup> While the Thirteenth Amendment abolished slavery, change inevitably took time. Remarkably, progress toward full racial equality was significantly hindered following the Civil War. Under the disingenuous rubric of "separate but equal," state Jim Crow laws continued to maintain the geographic spaces that defined race relations – the color line – by mandating the public segregation of people based on race.<sup>231</sup> The privilege of *simply being in public spaces* seemed indelibly etched into whiteness.<sup>232</sup>

Interestingly, by 1875, most state judges had lost the metrics of judicial independence they shared with Article III judges and became elected or appointed.<sup>233</sup> In light of the Jim Crow laws in many states, and given the need

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229. See Purcell, *Class Action*, *supra* note 30, at 1827.

230. *Prigg v. Pennsylvania*, 41 U.S. 539, 540-41 (1842).

231. See Sharon E. Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 21 (1999).

232. For some people, that impression lingers. For example, the controversy surrounding what happened to Trayvon Martin and the question about whether he "belonged" in the neighborhood that night – racial territoriality – exemplifies how the color-line continues to divide people. See Dan Barry et al., *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES (Apr. 1, 2012), [http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?\\_r=0](http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?_r=0). How confusing is race and how confused are we as a society, generally, about race? Consider that the attorneys in the case reassured the jury that the case was not about race. See, e.g., Lisa Lucas & Corky Siemaszko, *Trayvon Martin Trial: After Prosecution Witness Grilled over 'Cracker' Comment, Martin Family Lawyer Says Trial Not About Race*, N.Y. DAILY NEWS (June 28, 2013, 5:02 AM), <http://www.nydailynews.com/news/national/trayvon-martin-trial-prosecution-star-witness-grilled-article-1.1384074>. But all of the media attention about the case focused on virtually nothing but race, and, ironically, on the question whether or not it really was about race. A Pew Research Study found that eighty-six percent of blacks, but only thirty percent of whites, were dissatisfied with the Zimmerman verdict. See *Big Racial Divide over Zimmerman Verdict: Whites Say Too Much Focus on Race, Blacks Disagree*, PEW RESEARCH CTR. FOR PEOPLE & PRESS (July 22, 2013), <http://www.people-press.org/2013/07/22/big-racial-divide-over-zimmerman-verdict/>. The study also found that seventy-eight percent of blacks and twenty-eight percent of whites believed the case raised important issues about race. *Id.*

233. Fitzpatrick, *supra* note 87, at 842.

of state judges to be re-elected or re-appointed, the continuing impartiality of Article III judges meant that they could be trusted, at least compared to state judges, with protecting the newly-freed slaves' individual rights. Federal question jurisdiction provided them a pathway to federal court.

From the federalism perspective, the significance of Congress making general federal question jurisdiction *concurrent* with state jurisdiction – and not exclusively federal – cannot be overstated. Consistent with this Article's theme, although saved for another day, states arguably have a right to hear federal question cases and Congress would not have the authority to make it exclusively federal.<sup>234</sup> In reality, though, this is unlikely to be an issue because engaging in constitutional interpretation is one of the most powerful ways for a state to participate in the national government. No state has declined to participate in this enterprise by refusing to exercise federal question jurisdiction.

This is different from saying that Congress has the constitutional power to make states hear federal question cases. Consistent with federalism and the Court's recent reliance on the anti-commandeering principle,<sup>235</sup> it is reasonable to question whether Congress has the constitutional authority to make states hear all federal question cases. In its 1947 decision *Testa v. Katt*, the Court held that states must hear federal claims when states provide for review of similar types of cases under their own laws.<sup>236</sup> But, again, the question is largely theoretical with respect to federal question cases that raise constitutional issues.<sup>237</sup> By making general federal question jurisdiction concurrent

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234. Alexander Hamilton opined that federal and state courts would enjoy concurrent jurisdiction over federal claims absent special circumstances that would warrant making jurisdiction exclusively federal. See THE FEDERALIST NO. 82 (Alexander Hamilton); see also Purcell, *supra* note 38, at 692 n.43.

235. See, e.g., *Printz v. United States*, 521 U.S. 898, 902, 935 (1997) (holding that Congress lacks authority to make states participate in administering background checks on gun purchases under federal regulatory law); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress lacks authority to make states "take title" to radioactive waste under federal regulatory scheme).

236. 330 U.S. 386, 394 (1947). *Testa* is often cited as the case that establishes the principle that states have a duty to hear federal cases. See, e.g., *Printz*, 521 U.S. at 928; Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 950 (2006). But in *Testa*, the underlying issue involved a federal statute, the Emergency Price Control Act, and Rhode Island provided for state court review of similar issues. *Testa*, 330 U.S. at 387-88. It also has surfaced in section 1983 cases, and in cases under the Federal Employer's Liability Act. See *Howlett v. Rose*, 496 U.S. 356, 373-74 (1990); Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006). Moreover, the recent decisions in *Printz* and *New York* cause some scholars to question whether the federal government can make states hear federal cases. See Bellia, *supra*; ERWIN CHERMERINSKY, FEDERAL JURISDICTION 216-218 (5th ed. 2007).

237. The difference between statutory and constitutional cases is significant. Presumably, states want to participate in constitutional interpretation, but they might

with states, Congress reinforced the importance of states in our system of government. What better way to demonstrate the importance and uniqueness of each state than to continue to have them share responsibility with Article III courts for interpreting federal law, including the Constitution, even though the basic premise underlying the enactment of federal question jurisdiction was to avoid unfair state court bias against federal claims.<sup>238</sup> Certainly, when Congress provided for general arising under jurisdiction and did not cut out state courts (even if it was a matter of efficiency and a practical need to have state courts hear federal claims), it allowed state court judges – even ones thought to be unfairly biased by the “local spirit” – to participate in deciding the meaning of federal law, including the Constitution. Naturally, state courts adjudicating federal claims were, and still are, bound by the Constitution to respect the supremacy of federal law. Any mistakes made by lower court judges, state or federal, are amenable to correction by the Supreme Court.

Moreover, from the beginning, the judicial system relied on state courts to hear federal claims knowing that state court judges would reach different conclusions in their interpretations of federal law. In fact, providing for “uniformity” in federal law is often cited as a core reason for extending federal question jurisdiction to federal courts.<sup>239</sup> Time has shown that the goal of achieving uniformity, however, has been elusive.<sup>240</sup> Even if concurrent arising under jurisdiction is not constitutionally compelled, as I believe it is, a divergence among judges – state and federal – as to the meaning of federal law has always existed and has come to be an acceptable part of our democracy. Stated alternatively, the diversity among the different state judges’ voices is an integral part of federalism because each state is an independent sovereign.

The Supreme Court naturally has the authority to review state court decisions to clarify the meaning of federal law and to ensure its supremacy, but that authority is largely discretionary under the Court’s certiorari process. The Court, particularly under the late Chief Justice Rehnquist and continuing through Chief Justice Roberts, has been extremely interested in granting certiorari in cases that raise a wide spectrum of federalism issues.<sup>241</sup> While states do not win all the time,<sup>242</sup> the Court has protected state sovereignty

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have less incentive to participate in the interpretation of federal statutes, unless the statute has a direct effect on the state. For example, a state presumably would be interested in interpreting immigration federal statutes, but might have less interest in hearing individual employment discrimination cases under Title VII under FELA. See *Bellia*, *supra* note 236.

238. See *supra* Part II.B.

239. Seinfeld, *supra* note 107, at 97.

240. *Id.*

241. See Stephen E. Gottlieb, *What Federalism & Why? Science Versus Doctrine*, 35 PEPP. L. REV. 47, 52, 57 (2007).

242. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2534 (2012) (holding that Congress’ power to regulate immigration preempted conflicting state laws); *Nat’l*

under various parts of the Constitution, including the Commerce Clause<sup>243</sup> and the Tenth,<sup>244</sup> Eleventh<sup>245</sup> and Fourteenth Amendments.<sup>246</sup> It also has interpreted 42 U.S.C. § 1983, otherwise known as the Civil Rights Act of 1871, in ways that make it increasingly difficult for individuals to seek redress for violations of their individual liberties by states.<sup>247</sup>

In the larger scheme, though, the Court reviews less than ten percent of the cases that seek review.<sup>248</sup> Consequently, many state court decisions are the final word in a particular case. When the Supreme Court does review a state court's decision, it benefits from the legal reasoning of different state, and perhaps federal, judges who decided similar cases. A primary reason for granting certiorari in a given case might be because there are conflicting decisions among lower courts – state or federal. In the final analysis, it might be a state court's reasoning that is affirmed by the Supreme Court.<sup>249</sup>

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Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (holding that Congress lacks Commerce Clause power to make states participate in Medicaid expansion or lose all of their federal funding for Medicaid); *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that Congress has the Commerce Clause power to criminalize the possession of medical marijuana even though California did not make it a state crime); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that a state law criminalizing homosexual sodomy is an unconstitutional violation of privacy under the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that Colorado's amendment to its state constitution prohibiting gays from seeking equal protection of the laws is unconstitutional).

243. *Lopez v. United States*, 514 U.S. 549, 551 (1995) (holding that Congress lacks Commerce Clause power to criminalize the possession of a gun within 1000 feet of a school).

244. *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks power to abrogate state's sovereign immunity in state court); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress lacks Commerce Clause power to commandeer states into federal regulatory program).

245. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (holding that Congress lacks Commerce Clause power to abrogate a state's sovereign immunity protected under the Eleventh Amendment). *But see* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment is limited by Congress' enforcement power under Section Five of the Fourteenth Amendment).

246. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress' Section Five power to enforce the Fourteenth Amendment does not authorize it to create new rights).

247. *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-65 (1989) (noting that the state is not a person subject to suit under section 1983 because Congress did not express a clear intent to abrogate a state's sovereign immunity).

248. *See infra* Part VII.

249. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 131-32 (1989) (affirming state court decision upholding state law that created presumption of paternity in marital husband over biological father).

*C. Geographic Identity of States*

The significant point, though, is that whether or not a judge enjoys judicial independence, he or she nevertheless has a geographic identity. That identity, grounded in federalism principles protected by the Constitution, can be enormously important in defining the relationship between federalism and Article III. Professor Purcell describes this influence:

Indeed, the fact that no federal judicial district crossed state lines gave the national courts an abiding state-specific identity, while the selection of area residents for federal judgeships and the influence of both local politics and senatorial courtesy on the appointment process reinforced the weight of local concerns among federal judges. Local and regional values shaped the character of those appointed, and they shaped as well the character of the local bars and professional elites with whom those judges lived and worked.<sup>250</sup>

Thus, the histories and traditions that shape a state's identity belong just as much to an Article III judge sitting in a particular state as they do to a state judge. Alexander Hamilton, expressing his fear that state judges might be biased against federal claims in state court, opined that "the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes"<sup>251</sup> An Article III judge, like a state judge, "belongs to" the geographic state (or circuit) in which he or she sits. Article III judges can claim their geographic areas (states or circuits) as their judicial territory and, correspondingly, citizens living in the geographic areas where the Article III judges sit can claim those judges as "their" judges. Regardless of an individual Article III judge's personality, the judge represents his or her state and, in essence, takes on the state's identity as its Article III representative. The experiences a judge has by virtue of belonging to a particular state shape the judge's views and even their reality of the world. In this way, Article III judges are representatives of the concept of state sovereignty.

Even under the assumption that most judges avoid unfair conscious bias, a judge's geographic identity nevertheless remains relevant because he or she will be experientially biased as a result of his or her geographic identity. Experiential bias is an inherent human trait and should not be conflated with unfair bias. Just as experiences based on race or sex influence each person, the experiences a judge has because he or she is a citizen of a particular state inevitably influence his or her decision making.

To summarize thus far, experiential bias suggests that people, including judges, make decisions that are not neutral, but which still can be fair and

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250. Purcell, *supra* note 38, at 716-17.

251. Seinfeld, *supra* note 107, at 113 n.54 (emphasis added) (the quote continues, "and, not being employees of the federal government, might be more inclined to protect state interests over federal ones").

based on the rule of law. The more important point is that experiential bias is omnipresent; it cannot be avoided. However, it also is not automatically unfair. Focusing on judicial bias, one must consider that a judge can be consciously or unconsciously biased, in a fair or unfair way. Here, I am not talking about judges who should recuse themselves because of a conflict of interest, or about the openly prejudiced judges who also should not be deciding cases that arouse their prejudices (if they should be judges at all). Rather, I am focusing on the reasonable judge. When a reasonable judge strays from reason and consciously rules in favor of one party without regard to legitimate procedural rules or the merits of the case, the judge is knowingly biased in an unfair way. For example, a judge who always rules in favor of a party just because the judge and the litigant have the same birthday is unfairly biased. The next Part draws on identity scholarship to expose how the fear of unfair bias associated with geography is very similar to the fear of unfair bias associated with other identity traits, such as race.

## VI. JUDGES AND IDENTITY: FROM FEDERAL JURISDICTION TO EQUALITY

Ironically, accusations of unfair judicial bias stemming from a judge's identity usually are not made until there is a shared identity connection between the judge and one of the litigants.<sup>252</sup> This is at the heart of the reason for diversity jurisdiction. Because the state judge and the local resident have a shared geographic identity – for example, State X – the judge is presumed to be biased in favor of Party X and against the other party from State Y. The resulting teams consist of “us,” Judge X and local resident from State X, and “them,” people from State Y.

This situation also arises when a judge and a litigant share other common identity traits. Significantly, though, it usually only arises when the judge is a member of a historically underrepresented group and shares an identity trait with one of the litigants. Consider a case in which a woman accuses a man of sexual harassment. The issue of unfair bias usually only arises if the case comes before a female judge. Typically, the presumption is the female judge is unfairly biased in favor of the female plaintiff and against the male defendant. The resulting teams consist of “us,” the female judge and female litigant, and “them,” men (particularly the male defendant).

Identity scholarship exposes the hidden assumptions behind this concern because, of course, it is logical to assume that if a female judge were unfairly biased in favor of a female plaintiff, then a male judge would be unfairly biased in favor of a male defendant. The latter possibility, of course, usually is not a concern because male judges are thought to be objective and neu-

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252. See, e.g., Michael A. Lindenberg, *Should the Prop 8 Decision Be Overturned Because the Judge is Gay?*, TIME, Apr. 26, 2011, <http://content.time.com/time/nation/article/0,8599,2067679,00.html>.

tral.<sup>253</sup> In the specific context of a sexual harassment suit, the source of the male judge's neutrality is that he is not a woman and therefore can remain objective. The parallels between the male judge's perceived objectivity in the sexual harassment suit and that of an Article III judge in a diversity suit are readily apparent.

This focus, like the focus on bias in diversity jurisdiction, in many ways misses the moral crux of the matter.<sup>254</sup> Just as the Article III judge has a geographic identity, the male judge in the sexual harassment hypothetical, while not a woman, nevertheless has a sex and gender identity. The female or the male judge might be unfairly biased, even unconsciously so. In reality, though, they both will be experientially biased, because sex and gender have a profound effect on how women and men experience life. Some might even argue that a woman would be a fairer judge in a sexual harassment case because her experiences as a woman would enable her to better understand the power dynamics that lie at the heart of sexual harassment. Justice Sotomayor opined about the role of life experiences in judging before she was appointed to the Court: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."<sup>255</sup> Reactions to Justice Sotomayor's comments, including her own explanation during her confirmation hearings in which she said that "she made a bad play on words,"<sup>256</sup> highlight how complicated identity "politics" can be.

The sexual harassment hypothetical and Justice Sotomayor's comment are consistent with the Group Equality Principle, which is premised on the idea that belonging to a historically-discriminated group influences how one perceives the world. Regardless of where one might come out on that point, certainly, there is no basis to support an accusation that a female judge in a sexual harassment case would be unfairly experientially biased and that a male judge would be fairly experientially biased (which historically means not biased at all). Today, through education and a growing awareness of stereotypes, many people might presume that both the male and female judge

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253. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 832 (1990) ("[T]he theory of positionality offers the best explanatory grounding for feminist knowledge. Positionality rejects both the objectivism of whole, fixed, impartial truth and the relativism of different-but-equal truths. It posits instead that being 'correct' in law is a function of being situated in particular, partial perspectives upon which the individual is obligated to attempt to improve.").

254. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1371, 1387 (1986).

255. Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, [http://www.nytimes.com/2009/05/15/us/15judge.html?\\_r=0](http://www.nytimes.com/2009/05/15/us/15judge.html?_r=0).

256. *High Marks for Sotomayor After Tough Questioning*, CNNPOLITICS.COM (July 14, 2009, 8:22 PM), <http://www.cnn.com/2009/POLITICS/07/14/sotomayor.hearing/>.



will adjudicate the case fairly even though their gender differences shape how each of them views or understands the dynamics of sexual harassment.

But the progress we have made in sex and gender equality is less evident in other areas wherein presumptions of unfair bias persist. In fact, this was the focus of yet another case before the Court this term, *Hollingsworth v. Perry*.<sup>257</sup> In *Perry*, Judge Vaughn Walker of the U.S. District Court for the Northern District of California was accused of being unfairly biased when he ruled that California's Proposition 8 (banning same-sex marriage) is unconstitutional.<sup>258</sup> His sexual orientation was never a public issue during the trial because he did not tell the public that he is gay.<sup>259</sup> Once he announced that, however, some people called for his ruling to be voided, accusing him of unfair bias and claiming that he ruled the way he did so he could marry his long-term partner.<sup>260</sup>

Several hidden assumptions lurk behind this curtain. Most obvious is the assumption that Judge Walker could not be fair or impartial because of his sexual orientation and, correlatively, that a heterosexual judge would automatically have been fair and impartial because of his or her sexual orientation. This accusation that a judge will be unfair because he or she could issue a ruling that positively affects the judge seems to align with the position that the judge should recuse himself or herself because he or she has a conflict of interest in deciding the case. But this is a red herring, which becomes obvious when viewed from a different perspective.

More realistically, the accusation that Judge Walker was unfairly biased likely stems from a prejudice against homosexuals, based on conscious and unconscious homophobia by different members of the protestors. This can be deduced by exposing a perhaps less obvious assumption that appears neutral to many equality-minded people: that a heterosexual judge would have ruled the other way and upheld the ban on gay marriage. We know these assumptions operated in this case because otherwise there would not have been such public outrage. If those people who were upset with Judge Walker's ruling had thought it was "fair," they would have had no basis for trying to invalidate it. By calling for a heterosexual judge to decide the case, those people who were upset clearly wanted a different outcome, which from their view would have been fair.

What many equality-minded people miss in a situation like this is obviated upon learning some of the lessons offered by identity scholarship. Just as any judge deciding a race discrimination case has a racial identity, or as any judge deciding a sex discrimination case has a gender identity, any judge deciding a sexual orientation discrimination case will have a sexual orienta-

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257. 133 S. Ct. 2652 (2013).

258. See Lindenberger, *supra* note 252.

259. *Id.*

260. *Id.*

tion identity. And, in fact, an individual's identity will be a mixture of certain traits – a black female judge or a white heterosexual judge, for example.<sup>261</sup>

Identity has always mattered because of the experiential biases that attach to identity. Generally, though, the identities of historically privileged groups set a baseline for what is considered “neutral” or “objective” and this enabled those identities to become invisible even as they empowered those people who shared them. Identity scholarship is premised on exposing how the law functions to protect historically privileged groups based on their race (Caucasian), sex (male), sexual orientation (heterosexual), religion, (Christian), and so forth.<sup>262</sup>

Social science also supports the critical observations of identity scholars. Returning to the context of race and employment discrimination, empirical studies show that the race of the judge and the plaintiff is statistically relevant in predicting whether a case survives summary judgment.<sup>263</sup> For example, “[w]hite judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges.”<sup>264</sup> Moreover, “white judges tend to dismiss cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs.”<sup>265</sup> Interestingly, minority judges dismissed cases of minority plaintiffs at a higher rate than they dismissed cases of white plaintiffs.<sup>266</sup> Professors Jill Weinberg and Laura Nielsen suggest that these outcomes are consistent with other research that shows that people “are more or less likely to perceive the presence of discrimination based on their identification with a stigmatized social group.”<sup>267</sup> Again, this is consistent with valuing the Group Equality Principle and with the concept of “critical mass.”

All judges bring to the bench their experiential biases, but this is far from saying that judges are unfairly biased because of who they are. But who they are still matters because experiential bias influences decision making. Social science studies indicate that people can be taught to be more empathic toward people who have different identity traits.<sup>268</sup> As expressed above, learning to be empathic toward others is facilitated by being actively engaged with them, for example, in a school setting. High empathy skills are yet another sign of high emotional intelligence.<sup>269</sup> Today, equality-minded people

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261. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

262. See, e.g., *id.* at 140; James, *supra* note 170.

263. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 347 (2012).

264. *Id.* at 346.

265. *Id.*

266. *Id.*

267. *Id.* at 326.

268. *Id.* at 349-50.

269. Goleman, *supra* note 198, at 105.

are working diligently to undo the harm caused by laws that promote inequality. They are learning about the unfairness of stereotypes and trying to avoid basing decisions on them.

This Article merely highlights that geographic identity is yet another factor that influences decision making, sometimes in strangely obvious or not-so-obvious ways. “For reasons that remain unclear, for example, during the period from 1973 to 1990 federal courts in the West were less receptive to abortion rights than were federal courts in other regions of the country.”<sup>270</sup> It may not come as a surprise to learn that the five states with the highest average ages of marriage are in the Northeast, or that “[t]he states with the lowest average ages of marriage . . . are in the South, the mountain west, or the border between the North-South border . . .”<sup>271</sup> Generally, and consistent with federalism, family law cases belong in state courts;<sup>272</sup> but many family issues relate to questions that, for some state citizens, involve morality and implicate constitutional questions about equality and due process. The marriage laws in states reflect the states’ norms and are consistent with their political identities as either “liberal” or “conservative.” It is important to remember, however, that these labels are generalities and states should not be stereotyped or pigeon-holed into reified historical identities that they are not allowed to overcome. This is exactly what *Shelby County*<sup>273</sup> was about – had Shelby County corrected its prior identity as a county that discriminates on the basis of race in elections, and if so, did Congress continue to have the power to enforce the Voting Rights Act in that county?

Experiential bias based on geographic identity is a unique kind of bias that may or may not have anything to do with unfair bias against people based on their race, ethnicity, gender, or other identity traits. For example, an Alaskan Article III judge presumably will not let his or her state identity unfairly affect a case, but the Alaskan judge will nevertheless always be a representative of Alaska and have “experiential” bias. If a case were to arise involving an issue especially important to Alaska – for example, drilling for oil off the coast – we presume the Article III judge could and would avoid being unfairly affected by his or her biases stemming from the geographic connection between the judge and one of the litigants. With respect to conscious geographic bias, we believe he or she would be able to avoid that, but we also know unconscious bias is real. Modern social science studies show that an individual with a strong “environmental identity” has “less difficulty and greater confidence” in making decisions that have an impact on the environ-

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270. Purcell, *supra* note 38, at 719.

271. June Carbone & Naomi Cahn, *Judging Families*, 77 U.M.K.C. L. REV. 267, 289-90 (2008). The five Northeastern states are Massachusetts, New York, Rhode Island, Connecticut, and New Jersey. *Id.* at 289. The states with the lowest average ages are Utah, Oklahoma, Idaho, Arkansas, and Kentucky. *Id.* at 290.

272. See generally Sharon E. Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1 (1984).

273. 133 S. Ct. 2612, 2618-19 (2013).

ment.<sup>274</sup> Consistent with this modern research, one could reasonably expect that the Alaskan judge, because of his or her Alaskan “experiential” identity, would view and understand the dynamics of the drilling case in a way that a non-Alaskan judge might not. The two judges might even reach different conclusions. Significantly, different conclusions would not necessarily be the result of unfair bias. Rather, they might be the result of different interpretations and understandings of the case – in other words, the result of the judges being two different people with two different life experiences.<sup>275</sup> Justice Byron White appreciated having Justice Thurgood Marshall on the Court, because Justice Marshall “ . . . would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.”<sup>276</sup> That is why the Article III judiciary must be geographically diverse. Each state, as a matter of sovereignty, has a right under federalism principles to have its voice heard from the Article III bench.

In light of the theory behind diversity jurisdiction – to avoid a judge’s state identity from unfairly influencing his or her judgment – it seems counterintuitive to suggest that a state has a “right” to be represented on the Article III bench. But it is worth highlighting that federalism requires a geographically diverse judiciary. We presume judges know when to recuse themselves because of their own limited abilities to be fair, but we also know that unconscious bias influences judges’ decisions. Chief Justice Roberts recently articulated that public officials can most easily avoid race discrimination by adopting a colorblind philosophy,<sup>277</sup> a view many people eschew. Unlike the debate over colorblindness, not only does the Constitution not require that we be blind to geographic diversity, but the very foundation of federalism is premised on acknowledging and valuing that diversity. Federalism protects the equality of states with respect to their “rights” to be treated as equal by the national government. Not only does geographic identity help shape one’s views, like other identity traits do, but it is precisely because we

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274. Patrick Devine-Wright & Susan Clayton, *Introduction to the Special Issue: Place, Identity and Environmental Behavior*, 30 J. OF ENVTL. PSYCHOL. 267, 268 (2010).

275. See generally Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); see also Purcell, *Class Action*, *supra* note 30, at 1849-50.

276. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

277. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, J., plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). The idea that the “[C]onstitution is colorblind” ironically comes from Justice Harlan’s dissent in *Plessy v. Ferguson*, in which the Court upheld the “separate but equal” doctrine. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

do not know if a particular bias is unfair that any chances that it might be must be born equally among a holistically diverse federal judiciary.

## VII. THE SUPREME COURT

As the institution in the United States that tells us “what the law is,”<sup>278</sup> it is especially important for the Supreme Court, as an anti-majoritarian institution, to be representative of the people. Naturally, reasonable people disagree on what it means for the Justices to be representative of the people. For example, although the Constitution does not require the Justices to have any particular qualifications, all 112 Justices have been lawyers; however, some people might argue that lawyers are not representative of the people. Moreover, even if one thinks that being a lawyer is a reasonable qualification to expect of Justices, who, as Hamilton put it, are the “guardians of the Constitution,”<sup>279</sup> one might nevertheless be concerned about the growing tendency for the Justices to receive their legal education at a few elite law schools – all of which happen to be in the Northeast.<sup>280</sup> These types of concerns raise diversity issues, which in turn raise issues about equality and representation.<sup>281</sup>

Geographic diversity, in contrast, raises questions about federalism and representation. Accordingly, it is logical to consider the role federalism and states should play in making the Court representative of the people. As explored below, it is clear that geography played a much more significant role at the beginning of the nation’s history. Some scholars have called for a modification of the current Court’s operations, primarily for efficiency reasons, including the possibility of increasing the number of Justices.<sup>282</sup> Consistent with those proposals and this Article, a geographically representative Court could have a Justice from each of the regional circuits. At a minimum, this

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278. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

279. THE FEDERALIST No. 78 (Alexander Hamilton).

280. Barton, *supra* note 39, at 1168-70. Currently, all of the Justices attended either Harvard or Yale. *Id.* at 1139. Justice Ginsburg attended Harvard but received her law degree from Columbia Law School, which is also an Ivy League school. *See id.* at 1187; *Biographies of Current Justices of the Supreme Court*, U.S. SUPREME COURT, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 21, 2014). Notably, this cluster of law schools is geographically isolated in the Northeast. *See* Barton, *supra* note 39, at 1164.

281. For example, six current Justices, Roberts, Scalia, Kennedy, Breyer, Thomas, and Sotomayor, are Catholic. Michael Paulson, *Sotomayor Would Be Sixth Catholic Justice*, BOSTON GLOBE (May 26, 2009, 2:33 PM), [http://www.boston.com/news/local/articles\\_of\\_faith/2009/05/sotomayor\\_would.html](http://www.boston.com/news/local/articles_of_faith/2009/05/sotomayor_would.html).

282. *See, e.g.*, F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 Ariz. St. L.J. 645, 647 (2009); Jonathan Turley, *A Bigger, Better Supreme Court: The Case for Reform*, THE GUARDIAN (June 27, 2012, 1:24 PM), <http://www.theguardian.com/commentisfree/2012/jun/27/bigger-bet-ter-supreme-court-reform>.

Article suggests that those involved in the confirmation process should be more sensitive to, and appreciative of, the relationship among federalism, diversity, and equality to achieve greater geographic diversity on the Court.<sup>283</sup>

### A. *Geographic Diversity and Federalism*

#### 1. Early History

Historically, there are at least four indications of the importance of geography in establishing a strong relationship between the Supreme Court and the states. First, Article III provides that there is only one Supreme Court, which interestingly did not have a permanent home until 1935.<sup>284</sup> Prior to that, and while Washington, D.C. was under construction, the then six Justices of the Court met in New York City and then in Philadelphia.<sup>285</sup> In 1800, Washington, D.C. became the seat of the national government, but the Court did not have its own building until Chief Justice William Howard Taft persuaded Congress that the Court deserved and needed a permanent residence.<sup>286</sup> Finally, construction on the Supreme Court building was completed in 1935.<sup>287</sup> It is logical and consistent with treating the states equally that the Court is not situated in any one state.

Second, the Framers also gave careful consideration to establishing an equal relationship among the states with the Court. Highlighting an earlier observation, to minimize the possibility that judicial nominees would come disproportionately from the larger states, thus excluding the voices of smaller states, the Framers provided in Article III for Senate confirmation of all Article III judges, including Justices of the Supreme Court.<sup>288</sup> Moreover, senators are heavily involved in the nomination process for lower federal court judges.<sup>289</sup> Through judicial selection commissions, senators can nominate candidates – perhaps the most direct way for states' voices to be heard. Their participation certainly adds geographic diversity to the process.<sup>290</sup> Critically, heavy involvement of senators in the nomination process for lower federal

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283. *See infra* Part VII.B.

284. *The Court Building*, U.S. SUPREME COURT, <http://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Mar. 21, 2014).

285. *Id.*

286. *Id.*

287. *Id.*

288. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1496 (1992).

289. Clark, *supra* note 58, at 465-67; *see also* DENIS STEVEN RUTKUS, CONG. RESEARCH SERV. (CRS), SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 2-3 (July 6, 2005), *available at* <http://fpc.state.gov/documents/organization/50146.pdf>.

290. Clark, *supra* note 58, at 465.

judges increasingly affects who ultimately sits on the Court because nominees increasingly have court of appeals experience.

A third and extremely significant indication of the importance of geography in the relationship between the Court and the states lies in the way Congress structured the Article III judiciary and established the policy of “circuit riding.”<sup>291</sup> Specifically, in the Judiciary Act of 1789, Congress created circuit courts and, rather than staffing them with circuit judges, provided for the Supreme Court Justices to “ride circuit.”<sup>292</sup> Two Justices would be assigned to a circuit where they lived<sup>293</sup> and, together with the district court judge in the region, would hold court.<sup>294</sup> Circuit riding served several purposes, including “[keeping] the Federal Judiciary in touch with the local communities.”<sup>295</sup>

The value of having the Justices ride circuit, ironically, was to facilitate the development of a uniform body of federal law and give “the people of every state a sense of national judicial power through the presence of the Supreme Court Justices.”<sup>296</sup> From this view, it seems that the relationship between the local and national judiciaries primarily served the Federalists’ goals. Through circuit riding, the people could see the value of having a strong centralized government by watching the Supreme Court Justices in action in their own geographic areas.

From the states’ views, though, it was important for the circuit Justices to be familiar with their circuit’s state laws, because most of the circuit courts’ dockets involved diversity cases. The late Chief Justice Rehnquist noted that all of the Justices, because they rode circuit, had to have knowledge of the law in their circuits.<sup>297</sup> It is important to keep in mind, of course, that state law controlled issues in diversity cases and judges did not draw on general federal common law unless they were filling in voids they believed were left by a state’s laws. From the states’ views, then, riding circuit allowed the Justices to protect state sovereignty.

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291. Thomas E. Baker, PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEAL 5 (2d ed. 2009).

292. *Id.*

293. See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1761 (2003). The Act of 1789 did not require that the Justice be a resident of his circuit; the Court adopted this rule. See *id.* at 1757.

294. *Id.* Congress was concerned, for example, about the costs associated with creating circuit court judges. *Id.* at 1757-58.

295. *Id.* at 1759 (quoting CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 58 (1926)).

296. *Id.* (quoting MARTIN H. REDISH ET AL., MOORE’S FEDERAL PRACTICE 100 app., at 12 (3d ed. 1997)).

297. Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 3 (1986).

Circuit riding immediately became unpopular with the Justices because the burden of traveling literally exhausted them even though they lived within their circuits. Pleas to Congress to abolish the practice fell on deaf ears for over 100 years.<sup>298</sup> As the country expanded, Congress provided for more circuits. Beginning with the creation of the Seventh Circuit in 1807, Congress increased the number of Justices on the Court to seven.<sup>299</sup> The newly added Justices were then responsible for riding circuit in the newly-established circuits.<sup>300</sup> This explains why the Court had ten justices in 1863; that was the year Congress established the Tenth Circuit.<sup>301</sup> Notably, this period marked the peak of geographic diversity and the concomitant representation of the states on the Supreme Court.

A fourth indication of the importance of geographic diversity on the Court came from the leadership of President Washington. He set an early tone for ensuring that the Court be geographically diverse, something he strongly believed in.<sup>302</sup> President Washington's belief in the importance of the geographic relationship between the states and the Article III judiciary, particularly the Supreme Court, was shared by his Vice President, John Adams who stated that,

It would have an [sic] happy effect if all the judges of the national supreme Court, could be taken from the chief Justices of the several states. The superiority of the national government would in this way be decidedly acknowledged. All the judges of the states would look up to the national bench as their ultimate object. As there is great danger of collisions between the national and state judiciaries, if the state judges are men possessed of larger portions of the people's confidence than the national judges, the latter will become unpopular.<sup>303</sup>

Realistically, of course, President Washington's pool of nominees was limited because of circuit riding and the need for Justices to live in their

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298. See Glick, *supra* note 293, at 1755.

299. *Establishment of the Seventh Circuit: "An Act Establishing Circuit Courts, and Abridging the Jurisdiction of the District Courts in the Districts of Kentucky, Tennessee, and Ohio"*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_05.html](http://www.fjc.gov/history/home.nsf/page/landmark_05.html) (last visited Mar. 21, 2014).

300. *Id.*

301. *Establishment of the Tenth Circuit: "An Act to Provide Circuit Courts for the Districts of California and Oregon, and for Other Purposes"*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_08.html](http://www.fjc.gov/history/home.nsf/page/landmark_08.html) (last visited Mar. 21, 2014).

302. Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797, 800 (2005).

303. *Id.* at 801 (quoting from a letter from John Adams to Stephen Higginson (Sept. 21, 1789), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 663 (MAEVA MARCUS & JAMES R. PERRY EDS., 1985)).



circuits. But President Washington's commitment to geographic diversity was much deeper. He wanted to avoid creating "jealousy" among the states by appointing more than one nominee from a state to the Supreme Court.<sup>304</sup> He stated, "It would be inexpedient to take two of the Associate Judges from the same state. The practice has been to . . . disseminate them through the United States."<sup>305</sup>

Following President Washington's lead, subsequent presidents also heeded the need for geographic diversity on the Court. For example, when Justice William Cushing of Massachusetts died, President Madison kept nominating candidates from Massachusetts, finally settling on Justice Story in 1811.<sup>306</sup> Beginning with President Lincoln's term, however, concerns about geographic diversity took on two added dimensions – issues related to the Civil War and Congress' creation of the courts of appeals.

The seat first occupied by John Rutledge of South Carolina in 1789 became known as the "southern" seat.<sup>307</sup> However, that changed after the Civil War because Republicans, who were a majority in Congress, were concerned that the slave states had too strong a voice on the Court.<sup>308</sup> At the time, recall that each circuit had a representative on the Court, and as a result, five of the nine circuits that existed before 1863 included only slave states.<sup>309</sup> In 1866, to reduce the influence of southern states on the Court, Congress reduced the number of Justices to seven and the number of circuits from ten to nine, including only two (the Fourth Circuit and what was then the Fifth Circuit) that consisted entirely of former slave states.<sup>310</sup> Congress restored the Court to nine Justices in 1869.<sup>311</sup>

Congress' modification of the Court's structure in light of its view that the former slave states had too much influence on the Court is evidence of a belief that geographic identity has, or is perceived to have, an influence on a

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304. *Id.* at 800.

305. Epstein et al., *supra* note 42, at 613 (quoting WILLIAM J. DANIELS, *THE GEOGRAPHIC FACTOR IN APPOINTMENTS TO THE UNITED STATES SUPREME COURT: 1789-1976*, 31 W. POL. Q. 226, 227 (1978)).

306. Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO. J. GENDER & L. 43, 48-49 (2007).

307. David M. O'Brien, *Packing the Supreme Court*, 1986 VA. Q. REV. 189, 212 (1986).

308. *Judicial Legislation*, FEDERAL JUDICIAL CENTER, [http://www.fjc.gov/history/home.nsf/page/landmark\\_09.html](http://www.fjc.gov/history/home.nsf/page/landmark_09.html) (last visited Apr. 21, 2014).

309. *Reorganization of the Judicial Circuits: "An Act to Fix the Number of Judges of the Supreme Court of the United States, and to Change Certain Judicial Circuits"*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_09.html](http://www.fjc.gov/history/home.nsf/page/landmark_09.html) (last visited Mar. 21, 2014).

310. *Id.*

311. *The Judiciary Act of 1869: "An Act to Amend the Judicial System of the United States"*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_10.html](http://www.fjc.gov/history/home.nsf/page/landmark_10.html) (last visited Mar. 21, 2014).

judge's decision making. If nothing else, it shows how important a state's identity can be with respect to the Supreme Court. From 1867 to 1877, the "southern" seat on the Court vanished.<sup>312</sup> President Lincoln had five opportunities to appoint people to the Court.<sup>313</sup> Not surprisingly, with the Civil War influence he was especially sensitive to geography and the South's identity as slave territory. And while he did not appoint anyone from the South, he did use his five appointments to select men from four different states: Ohio (two), Iowa, Illinois, and California.<sup>314</sup>

Shortly after Congress created the courts of appeals in 1891, presidents' nominees to the Court started to come from judges who had already been on the courts of appeals.<sup>315</sup> Justice Howell Jackson, for example, was elevated from the Sixth Circuit to the Supreme Court in 1893.<sup>316</sup> President Eisenhower openly proclaimed that he would nominate candidates for the courts of appeals with an eye to his nominees ultimately reaching the Supreme Court.<sup>317</sup> Today, Justice Kagan is the only Justice who does not have court of appeals experience.<sup>318</sup>

## 2. The Waning Importance of Geographic Diversity

Since our early history, some aspects of the Article III judiciary have reflected the continuing sentiment that geographic diversity is important. For example, although circuit riding stopped in 1891 with Congress' establish-

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312. See O'Brien, *supra* note 307. Justice Wayne from Georgia died in 1867 and was replaced by Justice Bradley from New Jersey. JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, *CONSTITUTIONAL LAW CASES AND MATERIALS* 1732 (14th ed. 2013). In 1877, Justice Harlan of Kentucky was appointed to the Court by President Hayes. *Id.* at 1733. Justice Powell of Virginia retired in 1987 and was replaced by Justice Kennedy of California in 1988. *Id.* at 1737. Justice Thomas of Georgia was appointed by President G.H.W. Bush in 1991 and is currently serving on the Court. *Id.* at 1738. In 2005, he was joined by Chief Justice Roberts of Maryland, who was appointed by President G.W. Bush. *Id.*

313. VARAT ET AL., *supra* note 312, at 1732.

314. *Id.* President Lincoln appointed Justices Chase and Swayne of Ohio, Justice Miller of Iowa, Justices Davis of Illinois and Justice Field of California. *Id.*

315. SUSAN NAVARRO SMELCER, RESEARCH SERV., R40802, *SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010*, at 17 (2010).

316. *Joseph Jackson, 1898-1925*, SUP. CT. HIST. SOC'Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/howell-jackson-1893-1895/> (last visited Apr. 19, 2014).

317. Epstein, Martin, Quinn & Segal, *supra* note 41, at 835.

318. Jonathan H. Adler, *National Review: Watching an Inexperienced Justice*, NPR (Oct. 4, 2010, 7:38 AM), <http://www.npr.org/templates/story/story.php?storyId=130320426>.

ment of the circuit courts of appeals,<sup>319</sup> Congress still requires that each circuit be represented by at least one Supreme Court Justice.<sup>320</sup> In their capacities as circuit representatives, the Justices typically hear emergency appeals and rarely sit as circuit judges.<sup>321</sup> When a new Justice joins the Court, the Chief Justice reviews the circuit assignments and makes adjustments.<sup>322</sup> The Chief Justice is assigned to the D.C., Fourth, and Federal Circuits.<sup>323</sup> It appears that whenever possible, the Chief Justice assigns the Associate Justices to their “home court” circuit when those become available.<sup>324</sup> Currently, Justices who are assigned to their “home” circuits include Justice Breyer (First), Justice Ginsburg (Second), Justice Alito (Third), Justice Kennedy (Ninth), and Justice Thomas (Eleventh).<sup>325</sup> Justice Scalia is assigned to the Fifth Circuit, an assignment originally made by Chief Justice Rehnquist in 1987.<sup>326</sup> Justice Alito is also assigned to the Eighth Circuit.<sup>327</sup> Justice Sotomayor is assigned to the Tenth Circuit (replacing Justice Breyer, who was re-assigned to the First Circuit when Justice Souter retired), and Justice Kagan, the newest Justice, is assigned to the Sixth and Seventh Circuits (which were represented by Justice Stevens before his retirement).<sup>328</sup>

Because the Justices rarely, if ever, sit as judges in their home circuits, their assignments are largely about representation. They represent their “homes” and the people living there. Justice Thomas, for example, is assigned to the Eleventh Circuit and when he visits the University of Florida, he always makes a point of calling this circuit *his* circuit.<sup>329</sup> In his warm and gracious way, Justice Thomas connects with his “home” audience and offers reassurances that he, as the circuit Justice, is constitutionally con-

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319. *Establishment of the U.S. Circuit Court of Appeals*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_12.html](http://www.fjc.gov/history/home.nsf/page/landmark_12.html) (last visited Mar. 21, 2014). The legislation that abolished circuit riding is known as the Evarts Act. *Id.* That Act did not eliminate the circuit courts, however. They were abolished in 1911. *The Judicial Code of 1911 and the Abolition of the U.S. Circuit Courts*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/landmark\\_13.html](http://www.fjc.gov/history/home.nsf/page/landmark_13.html) (last visited Mar. 21, 2014).

320. 28 U.S.C. § 42 (2012) (“A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.”).

321. *Supreme Court of the United States*, JUDGEPEdia, [http://judgepedia.org/Supreme\\_Court\\_of\\_the\\_United\\_States](http://judgepedia.org/Supreme_Court_of_the_United_States) (last visited Mar. 22, 2014).

322. *See* 28 U.S.C. § 42.

323. *Circuit Allotment of Justices*, U.S. SUPREME COURT (Sept. 28, 2010), <http://www.supremecourt.gov/orders/courtorders/ALLOTMENTORDER9-28-10.pdf>.

324. *See id.*

325. *Id.*

326. *Id.*; *2d Justice for Fifth Circuit*, N.Y. TIMES, Aug. 2, 1987, <http://www.nytimes.com/1987/08/02/us/2d-justice-for-fifth-circuit.html>.

327. *Circuit Allotment of Justices*, *supra* note 323.

328. *Id.*

329. Lindy McCollum-Brounley, *Supreme Visit*, UF LAW (Feb. 4, 2010), <https://www.law.ufl.edu/uflaw/feature/supreme-visit-2>.

nected to the circuit's citizens. And his ideology has nothing to do with this sentiment; it is simply a geographic bond that is deeply rooted in federalism and shared identities.

Beginning with President Nixon's term, however, geographic diversity has played less and less of a role with respect to the appointment of Supreme Court Justices. Some people suggest that it should be less important altogether in light of modern technology and the ability of people to connect with each other around the world in a matter of seconds.<sup>330</sup> But federalism will always connect geographic diversity with the Article III judiciary, particularly at the lower court level because of the way the judiciary is structured and the involvement of the Senate in the confirmation process. Still, the connection is weakening at the Supreme Court level. In the last twenty-seven years, a little longer than the twenty-five year time period Justice O'Connor gave for state colleges and universities to consider race in their admissions,<sup>331</sup> there have been thirteen Justices who self-identify as representing ten different states: Arizona (Chief Justice Rehnquist and Justice O'Connor), Illinois (Justices Stevens), California (Justice Kennedy), New Hampshire (Justice Souter), Massachusetts (Justices Breyer and Kagan), New Jersey (Justice Alito), Georgia (Justice Thomas), Maryland (Chief Justice Roberts), Virginia (Justice Scalia), and New York (Justices Ginsburg and Sotomayor).<sup>332</sup> The last "new" state to be represented on the Court is Arizona, with the appointment of Justice Rehnquist in 1972 by President Nixon.<sup>333</sup> Prior to that, the newest state was Colorado in 1962 with the appointment of Justice White by President Kennedy.<sup>334</sup> Nineteen states have never been represented on the Court: Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia, and Wisconsin.<sup>335</sup>

Another major concern that can be traced to the 1960s is the shrinking pool from which potential nominees are selected. Specifically, since Justice

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330. See, e.g., Seinfeld, *supra* note 107, at 113 n.54 (suggesting there is less concern about state courts being biased against federal claims because of "[c]enturies of economic and . . . political and cultural interconnectedness . . .").

331. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

332. The Supreme Court website identifies the states with which the individual justices identify. *Members of the Supreme Court of the United States*, U.S. SUPREME COURT, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Mar. 22, 2014). It is worth noting that when initially appointed to the Court, Justice Rehnquist identified as an Arizonan, but when elevated to Chief Justice, he identified as a Virginian. *Id.*

333. See *id.*

334. See *id.*

335. See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1163, 1163 n.82 (2012); *Members of the Supreme Court of the United States*, U.S. SUPREME COURT, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Mar. 22, 2014).

Thurgood Marshall was appointed to the Court from the Second Circuit in 1967, only Justices Powell, O'Connor, and Kagan have not been court of appeals judges.<sup>336</sup> Since 1967, just over eighty-one percent of the Justices had court of appeals experience.<sup>337</sup> One positive observation from this trend is that states' voices are playing a greater role in the selection of Supreme Court Justices. Their role in confirming lower court Article III judges, particularly court of appeals judges, is much more critical now that most Supreme Court nominees come from the courts of appeals. On the other hand, of the thirteen Justices since 1967 with court of appeals experience, Chief Justices Burger and Roberts and Justices Scalia, Thomas, and Ginsburg all were elevated from the United States Court of Appeals for the District of Columbia Circuit – a little over thirty-eight percent of the total number of Justices selected over that period.<sup>338</sup> This observation is not meant to diminish the qualifications of the Justices or any court of appeals judge. Rather, it is merely to suggest that the pool of potential nominees could be much larger and include nominees with different experiences. For example, the pool could include state judges, practicing lawyers, law professors, and even politicians.<sup>339</sup>

Should we, as a society, be concerned that virtually all Supreme Court nominees come from the courts of appeals? Should we be concerned that almost half of the current Justices were elevated from the same court of appeals? Does that give their home circuit too much representation at the expense of other circuits, diminishing the principle of federalism and its role in the Article III judiciary?

Some empirical research shows that, just like the racial identity of a judge is statistically significant in affecting the outcome in some types of cases as discussed above,<sup>340</sup> so too can the geographic identity of a judge be statistically significant. Calling it the "circuit effects," Professors Lee Epstein, Andrew Martin, Kevin Quinn, and Jeffrey Segal's empirical research led them to be concerned about "the possibility that federal-appellate-judges-turned-Supreme-Court-Justices are predisposed to affirm decisions coming

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336. See *Associate Judges: Thurgood Marshall*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/histBio.html#Marshall> (last visited Mar. 22, 2014); *Associate Judges: Lewis F. Powell, Jr.*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/histBio.html#powell> (last visited Mar. 22, 2014); *Associate Justices: Sandra Day O'Connor*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/histBio.html#oconnor> (last visited Mar. 22, 2014); *Biographies of Current Justices of the Supreme Court*, *supra* note 280.

337. See *Members of the Supreme Court of the United States*, *supra* note 332.

338. See *Biographies of Current Justices of the Supreme Court*, *supra* note 280; *Chief Justices: Warren E. Burger*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/histBio.html#burger> (last visited Mar. 22, 2014).

339. See Epstein, Martin, Quinn & Segal, *supra* note 41, at 834.

340. See *supra* notes 263-266 and accompanying text.

from the circuits they just left.”<sup>341</sup> They caution that their research does not find “circuit effects in the form of Justices consistently biased towards all the U.S. courts of appeals.”<sup>342</sup> However, their empirical studies show that “[f]or some [Justices], the attachment [to their home circuit] is so strong that [the Justice is] twice as likely to affirm decisions coming from [the Justice’s] former circuit as decisions coming from all others.”<sup>343</sup> The authors are especially concerned that Chief Justice Roberts and Justices Thomas, Scalia, and Ginsburg all were elevated to the Court from the D.C. Circuit, giving cases on appeal from that circuit a huge advantage.<sup>344</sup> Admittedly, and presumably, a justice who is inclined to be unfairly biased because of his or her geographic identity probably does not even realize it. Because empirical studies show that the Justices tend to favor their circuits in cases before the Court, the researchers conclude that the “norm has created a collective presumption in favor of decisions handed down by the D.C. Circuit judges.”<sup>345</sup>

As the Court becomes less geographically diverse, we, as a society, seem to become less aware of what the trend means. Here, a few lessons can be learned from the Civil War era. Specifically, the reaction of Congress and its efforts to reduce the influence of the former slave states by manipulating the number of circuits and the number of justices gives pause for reflection about what state identity means and how it relates to federalism, diversity, equality, and Article III. A significant lesson can be learned from comparing the opportunities President Lincoln had to appoint a Justice from the South with the opportunities President Nixon had to do the same.

Clearly, Congress operated on the assumption that if President Lincoln’s nominees came from southern states they would support slavery. And, perhaps as a matter of politics and the need to be politically supported, that was a realistic assumption. But to support slavery is to deny the humanity of blacks, as abolitionists and civil rights advocates acknowledged, and would make someone clearly prejudiced. This helps explain, perhaps, why President Lincoln did not nominate anyone from the South, although he had five chances.

Now consider the situation with President Nixon. He had the opportunity in 1969 to replace Justice Fortas from Tennessee, and he selected his nominees on the conviction that people from the South “deserve representation on

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341. Epstein, Martin, Quinn & Segal, *supra* note 41, at 837.

342. *Id.* at 837-38.

343. *Id.* at 834. In a footnote, the authors share that “in cases coming to the Supreme Court from the U.S. Court of Appeals for the First Circuit, the predicted probability of Justice Stephen Breyer – a former judge on that court – casting a vote to affirm is 0.69; for cases coming from all other circuits, that figure is 0.29.” *Id.* at 838 n.16.

344. *Id.* at 834, 838.

345. *Id.* at 838.

the Court.”<sup>346</sup> At the time, Justice Black of Alabama occupied the “southern” seat;<sup>347</sup> however, having another representative from the South would have been consistent with geographic diversity.

In the 1960s, of course, the civil rights movement was in full swing. The South openly resisted integration and insisted on keeping its historical identity as a part of the country that did not support racial equality. Ignoring that reality, President Nixon nominated two southerners: Clement Haynsworth from South Carolina, and Harold Carswell from Florida.<sup>348</sup> Both men failed to get Senate confirmation and suffered this defeat at least partly because of their records in support of segregation, which caused strong opposition from civil rights groups.<sup>349</sup> Once again, the identity of southern states as “racist” in violation of the Equality Principles figured prominently into the politics associated with Article III.

One lesson learned was that the South’s identity as former “slave territory” and as “segregationists” played a role in President Lincoln’s decision not to nominate someone from the South. By the time President Nixon nominated Haynsworth and Carswell, it was very clear that the people did not want racially-prejudiced Justices. To his credit, however, President Nixon stood by his belief that the South deserved to be represented on the Court. His misstep, then, was not nominating someone from the South; his misstep was nominating someone from the South with an identity that reflected a South that did not believe in the Equality Principles. In other words, President Nixon misjudged the senators who had to confirm his nominees. Consistent with their oaths to uphold the Constitution, they were unwilling to confirm nominees who supported segregation in violation of the Equality Principles. The senators who voted “no” on Haynsworth and Carswell respected the delicate relationship among federalism, diversity, equality, and the Article III judiciary.

Moreover, negative votes that respect that delicate balance are qualitatively different from negative votes that are based on ideology and are therefore purely political. This was the situation that caused the defeat of Judge Robert Bork, who took an ideological stand about the “proper” way to interpret the Constitution that most senators disagreed with.<sup>350</sup> Ultimately, President Nixon secured Senate confirmation of Justice Blackmun of Minnesota even though Chief Justice Burger, also of Minnesota, was appointed to the

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346. Richard Nixon, *Statement About Nominations to the Supreme Court*, AM. PRESIDENCY PROJECT (Apr. 9, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2456>.

347. See *Members of the Supreme Court of the United States*, *supra* note 332.

348. Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 266, 268 (1998).

349. *Supreme Court Nomination Battles: Clement Haynsworth and G. Harrold Carswell*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1895379\\_1895421\\_1895542,00.html](http://content.time.com/time/specials/packages/article/0,28804,1895379_1895421_1895542,00.html) (last visited Mar. 22, 2014).

350. See, e.g., Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 247, 328 (1999).

Court in the previous year.<sup>351</sup> In the history of the Court, the only other Justice from Minnesota was Justice Butler, who was appointed by President Harding in 1923.<sup>352</sup>

But it is important to remember that just because a state has an identity with respect to a particular issue, it does not mean that all of its citizens align with that identity. It is just as misguided to essentialize state citizens in the context of federalism as it is to essentialize individuals in the context of the Group Equality Principle. Some citizens did not support segregation and may have lived in states with Jim Crow laws. Today, someone can be a citizen of a “medical marijuana” state and be opposed to this, yet still strongly identify with his or her state. In fact, to ignore the experiential diversity among citizens within a state is inconsistent with the Equality Principles.

The empirical research that supports the “circuit effects” also gives pause for reflection. Certainly, one way to avoid that bias is for presidents to select nominees who are not already federal judges.<sup>353</sup> But to disregard a state’s right to be represented on the Court is inconsistent with federalism. Except for the years 1867 to 1877, and again from 1987 to 1991, there has always been a Justice from the South<sup>354</sup> on the Court. Currently, Chief Justice Roberts of Maryland and Justice Thomas of Georgia are from the South.<sup>355</sup> As noted earlier, the greatest percentage of African Americans in the United States live in the South.<sup>356</sup> The experiences of an African American from the South undoubtedly brings legitimacy to the Court – both as a matter of federalism and consistent with the Equality Principles. Justice Thomas exemplifies this. Moreover, having an African American from the South, regardless of his or her judicial ideology, is one way to begin to change the historical identity that many in the South want to leave behind.

Significantly, no other issue since slavery has so sharply shaped a state’s identity and, in the larger picture, whole geographic regions. The slavery issue was unique in dividing the country into two geographic regions: south/slave and north/free. And many issues currently in the political spot-

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351. See *Members of the Supreme Court of the United States*, *supra* note 332; *Chief Justices: Warren E. Burger*, *supra* note 338.

352. See *Members of the Supreme Court of the United States*, *supra* note 332.

353. See *supra* note 350.

354. See *Members of the Supreme Court of the United States*, *supra* note 332. The “South” generally is defined as those states below the Mason Dixon Line, the Ohio River and the 36th parallel, and includes Alabama, Arkansas, Delaware, D.C., Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *The South*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/555542/the-South> (last visited Mar. 22, 2014).

355. See *Biographies of Current Justices of the Supreme Court*, *supra* note 280.

356. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, *The Black Population: 2010*, 2010 U.S. CENSUS (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.



light remind us of how intense the debate between states' rights and individual rights can be; abortion and gun control are two poignant examples. But as intense as the political fight is in those debates, they are not tied to geographic regions in the same way slavery was.

Moreover, the empirical evidence suggesting that a Justice is more likely to vote in favor of his home circuit brings us full circle. Everyone is aware that there are ideological differences among Chief Justice Roberts and Justices Scalia, Ginsburg, and Thomas. Everyone is aware that they also hold different views about how best to uphold the Equality Principles. What the empirical evidence suggests, however, is that perhaps judges – at all levels and regardless of ideology – have an unconscious bias that causes them to vote for the “home team.” This is the very fear behind the creation of diversity jurisdiction, which, ironically, is not supported by empirical evidence.

### *B. Suggestions for Increasing Geographic Diversity*

Some scholars are exploring different ways to address problems they see with the way the current Court functions. For example, Professors Adam Morse and Julian Yap propose increasing the number of Justices to fifteen and dividing cases among panels of nine Justices.<sup>357</sup> They estimate that this model would enable the Court to increase the number of cases it hears from roughly seventy-four to 135.<sup>358</sup> Professors Michael Dorf and Lisa McElroy propose that retired Justices be allowed to hear cases when a sitting Justice has to recuse himself or herself.<sup>359</sup> Professors Paul Carrington and Roger Cramton propose the creation of a specialized court to decide which cases should be granted certiorari for review by the Supreme Court.<sup>360</sup> Their basic premise is that the Court should be deciding more cases and relying less on their clerks to decide which cases the Court should hear. Their proposal is to create the “Certiorari Division of the Supreme Court.”<sup>361</sup>

These examples highlight that some scholars think the Court's method of operation could be improved. This Article agrees and suggests that greater geographic diversity on the Court would be consistent with federalism and equality. One way to achieve this goal would be to increase the number of Justices on the Court. Obviously, the Court cannot have fifty Justices; however, a viable option is to have at least one Justice from each of the geograph-

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357. Adam H. Morse & Julian E. Yap, *A Panel-Based Supreme Court*, 37 OHIO N.U. L. REV. 23, 25 (2011).

358. *Id.* at 32, 42.

359. Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83-84 (2011).

360. Paul. D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 591 (2009).

361. *Id.* at 632.

ic areas – circuits – on the bench. Recall that this was the situation until concerns about the southern slave states having too much influence on the Court caused Congress to reduce the number of circuits and Justices.<sup>362</sup>

Interestingly, Professors Carrington and Cramton’s proposal to create a “Certiorari Division of the Supreme Court” is consistent with this idea. They suggest staffing the Division with thirteen experienced federal judges.<sup>363</sup> Significantly, their recommendation to appoint thirteen judges to the Division is not arbitrary. Rather, they are concerned with ensuring geographic representation and treating the states, as regional circuits, equally: “One member of the group might be drawn from each of the regional circuits to preclude suspicion of geographic bias.”<sup>364</sup> Similarly, thirteen Justices on the Court maximizes federalism; the Federal Circuit representative creates an odd number of Justices, minimizing the chances of tie votes. Over time, the chances of any particular state having a Justice on the Court would be immeasurably increased. But there is federalism value in having each geographic circuit represented on the Court.

Probably the most realistic way to increase geographic diversity on the Court is suggested by Professors Epstein, Martin, Quinn, and Segal, who call for presidents to be more sensitive to the possibility of putting forward nominees from underrepresented circuits.<sup>365</sup> Because there is now a “norm” of selecting nominees from the circuit courts, it is important for the President and senators to be aware of the “circuit effects” and its implications for protecting federalism and equality principles. This knowledge, naturally, can become part of the political fodder. On the other hand, the President and senators take oaths to uphold the Constitution. Equal representation is a core democratic value and one that applies to both states and individuals.

## VIII. CONCLUSION

The relationship among federalism, diversity, equality, and Article III judges is complex and many recent cases highlight how federalism and equality often are pitted against each other, as if one value must be more important than the other. This Article illustrates how similar these values are in the context of understanding identity and bias. The age-old reason behind diversity jurisdiction – to escape the perceived unfair bias of local state judges who share a geographic identity with the hometown litigant – provides a solid foundation for exploring how accusations of that bias are similar to

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362. *See supra* Part VII.A.

363. Carrington & Cramton, *supra* note 360, at 632.

364. *Id.*

365. Epstein, Martin, Quinn & Segal, *supra* note 41, at 877. The authors’ first choice for improving the way the Court is structured is for the President to move away from the “norm” of nominating sitting court of appeals judges and looking to a larger pool of potential candidates, including law professors, legislators, executives, and state judges. *Id.* at 834.

more recent accusations of unfair bias often targeted at historically underrepresented judges when their identities are the same as the litigants who appear before them.

This Article focuses on the idea of “experiential bias” to distinguish it from the unfair bias associated with diversity jurisdiction and judges of underrepresented groups. Experiential bias shapes the identity of every human being, including Article III judges. Moreover, an individual’s experiences are shaped by all of their identity traits, including their geographic identity. Article III judges, because they are responsible for protecting all constitutional values, must draw on their experiences to determine how to balance competing values in different situations. Experiential bias is inevitable and cannot automatically disqualify anyone from being a judge; if it did, no one could be a judge. Significantly, being experientially biased does not mean one is above the rule of law – quite the opposite, it means one understands how to apply the rule of law in ways that respect core constitutional values like federalism and equality. It means one has a deep respect for how core constitutional values work together to promote fairness and justice. Justice Holmes’ words of wisdom at the beginning of this Article ring true: “The life of the law has not been logic; it has been experience.”